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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1961
CERTIORARI GRANTED NOVEMBER 13, 1961

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18788

C. J. D. Rudolph and Irma M. Rudolph, Appellants,

versus

United States of America, Appellee.

Request as to Printing Only Certain Portions of the Record Under Rule 23 of the Rules of This Court—Filed January 27, 1961

Now come C. J. D. Rudolph and Irma M. Rudolph, Appellants, and, proceeding under Rule 23 of this Honorable Court, hereby file this request that only the following portions of the record now on file herein be printed, to-wit:

(1) Plaintiffs' First Amended Original Complaint (pages 2-18 of the record herein);

(2) Original Answer of Defendant (pages 19-20 of the record herein);

(3) Defendant's Answer to Amended Complaint (page 21 of the record herein);

[fol. 2] (4) Transcript of Testimony (pages 84-176 of the record herein);

(5) Opinion of the Court (pages 177-180 of the record herein);

(6) Judgment of September 28, 1960 (page 181 of the record herein).

Respectfully submitted,

Turner, White, Atwood, McLane and Francis, By B. T. McElroy, Attorneys for Appellants, 1900 Mercantile Dallas Building, Dallas 1, Texas.

Certificate of Service (omitted in printing).

IN THE UNITED STATES COURT OF APPEALS

SUPPLEMENT TO REQUEST AS TO PRINTING ONLY CERTAIN PORTIONS OF THE RECORD UNDER RULE 23 OF THE RULES OF THIS COURT—Filed January 27, 1961

Now come C. J. D. Rudolph and Irma M. Rudolph, Appellants, and, proceeding under Rule 23 of this Honorable [fol. 3] Court, hereby file this their Supplement to their request heretofore filed, and now move this Court as follows, to-wit:

(1) That Exhibit "A" to Plaintiffs' First Amended Original Complaint be considered in its original form in lieu of being printed as said exhibit has been transmitted as Plaintiffs' Exhibit No. 7 with the instruments on file with this Honorable Court as original exhibits.

Respectfully submitted,

Turner, White, Atwood, McLane and Francis, By B. T. McElroy, Attorneys for Appellants, 1900 Mercantile Dallas Building, Dallas 1, Texas.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 4]

IN THE UNITED STATES COURT OF APPEALS

ORDER TO FILE COUNTER-DESIGNATION OUT OF TIME OF ADDITIONAL TERMS FOR PRINTING—Filed January 27, 1961

On this day came on to be considered Appellee's motion for leave to file out of time counter-designation of additional portions of record for printing, and the Court being fully advised, it is

Ordered that motion be granted.

Dated this 12th day of January, 1961.

Richard T. Rives, Judge, United States Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS

COUNTER-DESIGNATION OF PORTIONS OF RECORD ON APPEAL TO BE PRINTED—Filed January 27, 1961

Pursuant to Rule 23 of the rules of this Court, the United States of America, by and through the United States Attorney for the Northern District of Texas, hereby designates the following portions of the record on appeal to be printed:

[fol. 5] (1) Defendant's interrogatories to the plaintiff (C. J. D. Rudolph).

(2) Answer of plaintiff, C. J. D. Rudolph, to defendant's interrogatories.

(3) Plaintiffs' Exhibit 10, Schedule of Events, Pages 1 to 6.

(4) Plaintiffs' Exhibit 11, Schedule of morning meeting, Friday, December 14, 1956.

(5) Plaintiffs' Exhibit 13, Memorandum of convention costs.

(6) Plaintiffs' Exhibit 14, Letter to Doctor Peale.

(7) Government's Exhibit 1, 1956 Convention Qualification Rules.

W. B. West III, United States Attorney, W. E. Smith, Assistant United States Attorney.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 6]

IN THE UNITED STATES COURT OF APPEALS

STIPULATION AS TO RECORD—Filed January 27, 1961

Subject to the approval of the Court, it is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that the following items, previously counter-designated by the Appellee for printing, shall not be printed as part of the record:

1. Defendant's interrogatories to the plaintiff (C. J. D. Rudolph).

2. Answer of plaintiff, C. J. D. Rudolph, to defendant's interrogatories.

B. Thomas McElroy, Counsel for the Appellant.

Abbott M. Sellers, Acting Assistant Attorney General, Counsel for the Appellee.

Dated this 20 day of January, 1961.

[fol. 7]

7

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

Civil Action No. 8317

C. J. D. RUDOLPH and ERMA M. RUDOLPH, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendants.

FIRST AMENDED ORIGINAL COMPLAINT—Filed August 31, 1960

Now come C. J. D. Rudolph and Erma M. Rudolph, husband and wife, hereinafter called "Plaintiffs", complaining of the United States of America, hereinafter called "Defendant", and with leave of Court first had and obtained, file this their First Amended Original Complaint, [fol. 8] and for such pleading would respectfully show the Court:

I.

Plaintiffs are both citizens of the United States residing in Dallas County, Texas, in the Dallas Division of the Northern District of Texas. Defendant is the United States of America.

II.

This action arises under the Internal Revenue Code and Plaintiff brings this complaint against Defendant pursuant to the provisions of Title 28, Section 1346(a)(1), United States Code. The nature of Plaintiffs' complaint is an action against the United States for recovery of overpayment of Federal income taxes and interest thereon for the calendar year 1956 together with interest on such sum, which has been erroneously assessed by Defendant and paid by Plaintiffs to Defendant and illegally retained by Defendant in the amount detailed hereinafter.

III.

Plaintiffs filed a joint Federal income tax return for the calendar year 1956 with the District Director of Internal Revenue, Dallas, Texas. This return was timely filed and the tax due thereon was timely paid to such District Director.

[fol. 9] IV.

The Commissioner of Internal Revenue (hereinafter sometimes called the "Commissioner") subsequently assessed a deficiency in income tax in respect of said calendar year in the amount of $126.90. Plaintiffs paid the asserted deficiency in income tax for the calendar year 1956, together with $10.19 interest thereon, to the District Director of Internal Revenue, Dallas, Texas, on or about September 8, 1958.

V.

Plaintiffs timely filed with the District Director of Internal Revenue, Dallas, Texas, a claim for refund of said deficiency and interest. A true copy of said claim for refund is attached hereto and marked as Exhibit "A".

VI.

In summation of the grounds for refund of the Federal income taxes set forth in detail in said claim for refund and incorporated herein by reference, Plaintiffs allege as follows:

1. That irrespective of the value of said convention trip, all of the costs of which were paid by Southland Life Insurance Company, Plaintiffs realized no gross income by reason of Southland Life Insurance Company's having paid all of Plaintiffs' costs in respect of said convention trip.

2. In the alternative, should the value of said convention trip constitute gross income to Plaintiffs, such value [fol. 10] and the gross income attributable thereto did not exceed $100.00.

3. Further, in the alternative, if Plaintiffs realized gross income in respect of said convention trip, whatever the amount thereof be, Plaintiffs are entitled to a deduction in an amount equal to said gross income by reason of the fact that Plaintiffs by making said convention trip incurred an ordinary and necessary expense in carrying on a trade or business of Plaintiff C. J. D. Rudolph in an amount equal to said gross income and accordingly Plaintiffs realized no taxable net income in respect of said convention trip.

VII.

The Commissioner sent to Plaintiffs on July 8, 1959, by registered mail notice of disallowance of said claim for refund and has not allowed said claim for refund or any portion thereof.

VIII.

For the reasons set forth in said claim for refund attached and marked Exhibit "A" and summarized in paragraph VI hereof, Plaintiffs erroneously paid to Defendant taxes in the amount of $126.90, together with interest thereon in the amount of $10.19, and Defendant owes Plaintiffs said erroneously paid sum and interest thereon as provided by law.

IX.

For their further pleading herein, Plaintiffs say that it is the custom, usage and practice of Southland Life Insur- [fol. 11] ance Company, and of life insurance companies generally, to sponsor conventions of the type herein in-

volved to serve valid business purposes of such companies as part of their training program for Field Representatives, agents, and employees, with said conventions used and designed for instruction, motivation and personal contact of such personnel for the furtherance of the legitimate business of the companies involved.

Wherefore, Plaintiffs demand judgment against Defendant for the sum of $126.90, taxes and of $10.19 interest, together with interest on such sum as provided by law, for costs and other relief as in law and in equity they are entitled to receive.

Turner, White, Atwood, McLane and Francis, By B. Thomas McElroy, Attorneys for Plaintiffs, 1900 Mercantile Dallas Building, Dallas 1, Texas.

[fol. 11a]

EXHIBIT "A" TO FIRST AMENDED ORIGINAL COMPLAINT

Form 843
(Rev. 5-56)

District Director's Stamp
(Date received)

EXHIBIT "A"

U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

CLAIM

To Be Filed With the District Director Where Assessment Was Made or Tax Paid

The District Director will indicate in the block below the kind of claim filed, and fill in, where required.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

PLEASE TYPE OR PRINT PLAINLY

Name of taxpayer or purchaser of stamps
C. J. D. Rudolph and wife Irma M. Rudolph

Number and street
3501 Purdue

City, town, postal zone, State
Dallas 25, Texas

1. District in which return (if any) was filed
Dallas, Texas

2. Name and address shown on return, if different from above

3. Period—If for tax reported on annual basis, prepare separate form for each taxable year
From January 1, 1956 To December 31, 1956.

4. Kind of tax
Income

5. Amount of assessment
$1,277.23

Dates of payment
April 15, 1957—$1,150.33;
September 6, 1958—$126.90

6. Date stamps were purchased from the Government

7. Amount to be refunded
$126.90

8. Amount to be abated (not applicable to income, estate, or gift taxes)
$

9. The claimant believes that this claim should be allowed for the following reasons:

Grounds for claim are set forth in Exhibit A-1 attached hereto and made a part hereof for all purposes.

Attach letter size sheets if space is not sufficient.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed C. J. D. RUDOLPH
C. J. D. Rudolph

IRMA M. RUDOLPH
IRMA M. RUDOLPH

Dated 12-18-1958

INSTRUCTIONS

1. The claim must set forth in detail each ground upon which it is made and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. If a joint income tax return was filed for the year for which this claim is filed, both husband and wife must sign this claim even though only one had income.

3. Whenever it is necessary to have the claim executed by an agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim.

4. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

5. Where the taxpayer is a corporation, the claim will be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

[fol. 11b]

EXHIBIT A-1 TO FIRST AMENDED ORIGINAL COMPLAINT

MR. AND MRS. C. J. RUDOLPH
DALLAS, TEXAS
GROUNDS FOR CLAIM FOR REFUND OF FEDERAL INCOME TAXES PAID FOR CALENDAR YEAR 1956

Facts

In 1956 taxpayer C. J. Rudolph was employed as a life insurance agent for Southland Life Insurance Company ("Southland"), whose principal office is in Dallas, Texas. C. J. Rudolph served in such employment as an independent contractor and not as an employee. In 1956 Southland held a convention in New York City for its executives and certain of its life insurance agents who had shown ability in the field of life underwriting. Southland paid all of the costs of such convention including the food and lodging in New York City of those attending and in most cases the cost of transportation to New York City and return. Both Mr. and Mrs. Rudolph attended this convention and all costs of their trip were paid by Southland.

The Revenue Agent determined that the value of this trip was $560 and included such amount in taxpayers' gross income. Taxpayers have no personal knowledge of the exact manner in which the Revenue Agent determined that the value of their trip was $560 but to the best of their information and belief such determination was made on the basis of the total costs incurred by Southland in respect of said convention divided by the number of persons attending, which costs were allocated between transportation and other expenses as follows:

[fol. 11c]

Round trip, Dallas to New York (including meals, etc. en route)	$380.00
Other costs	180.00
	$560.00

This convention was held by Southland to serve a very vital agency function; the senior officers of Southland were

present not only for discussion and guidance but to report past accomplishments and to project the overall program of Southland for the ensuing year. The enhancement of the personality of Southland, as well as the development of a close feeling and loyalty and the recognition of the worth and achievement of each individual, was effected through such a convention. An agent in attendance at such a convention thereby realizes his importance to Southland, feels a more vital part of it and recognizes his part in Southland's success and responsibilities.

Professional instruction by outstanding representatives in selling or management is provided through such a convention. And above all, the informational instruction obtained at such a convention through discussion of common problems with others similarly situated aids in the development of greater skill and excellence of performance and stimulated interest. Through such instruction, information, and motivation, those in attendance are challenged to meet Southland established goals and to make their careers a profession and a success, thereby becoming better agents [fol. 11d] and contributing more adequately not only to their own well-being but to the success and future of Southland.

The itinerary for this convention was as follows:

December 11, 1956—Special trains leave Dallas at 9:30 P. M.

December 13, 1956—Trains arrive Jersey City, N. J. approximately 3:30 P. M. Group transferred by bus to Hotel Waldorf-Astoria, arriving there approximately 4:00 P. M.

December 14, 1956—9:30 A. M. to 12:00 noon—business session as follows:

Invocation—Neil H. Wright, Lubbock, Texas
"Welcome to New York"—Ben H. Carpenter, Executive Vice President
Agents' Panel—Herman Ford, CLU, Moderator, Assistant Vice President and Director of Sales
Huff Baines, Austin
Jimmie Whitmire, Wichita Falls
Sully Woodland, San Antonio
Johnny Wright, Tyler

"The 1957 Agency Activity Program"—Glenn M. Brooks, Vice President

"Our Southland Life Future"—Dan C. Williams, President

"Your Company and Mine"—John W. Carpenter, Chairman of the Board

LUNCHEON—12:30 P. M.

Presiding—Field Scovell, Vice President and Sup't. Ord. Agencies

"Success Through Right Thinking" Dr. Norman Vincent Peale

2:30 P. M.—Sightseeing Tour of Manhattan

December 15, 1956 8:45 A. M. Breakfast for ladies only. Afternoon free. Tickets available for those desiring to go to Radio City Music Hall. 6:30 P. M. Dinner at Copacabana.

December 16, 1956 10:45 A. M.—Buses transport group to Jersey City. Trains depart Jersey City about 1:00 P. M. Arrive Dallas about 7:00 A. M., Tuesday, December 18.

Southland invited to this convention only those agents who met certain requirements relating to achievement so as to avoid the expense of educating agents who were not attaining proficiency in the marketing of insurance. Southland expected those agents who met these standards to attend the convention inasmuch as Southland expected to benefit through increased insurance in force and from [fol. 11c] high company moral resulting from the practice of holding such conventions. Southland considers that such a convention provides an excellent opportunity for its executive officers to discuss common problems and opportunities with successful agents, and the only practical occasion for contact between most of the agents and executive officers is through such a convention.

The time and place of the convention meetings are selected by Southland as well as the location of accomodations on the train and at the hotel for those attending. Southland also decides the method of travel and deter-

mines the schedules for such travel and such travel is always accomplished on a group basis originating from one or two originating points. This is done not only to make for more efficient use of time but to further facilitate individual conferences and discussion among those attending. Persons attending such convention are required to abide by travel arrangements specified by Southland. Thus Southland controls and dictates substantially all facets of such a convention. Those who declined Southland's invitation to attend the convention received nothing of value. Neither does Southland give any cash or cash equivalent award in lieu of attendance at such a convention nor permit an invitee to designate a substitute invitee. Thus the controls and restrictions placed on attendance at such a convention prevent its having a fair market value in excess of a nominal amount.

Southland considers that an agent's wife plays an important role in his career. An insurance agent cannot work on a regular schedule and produce a satisfactory volume [fol. 11f] or kind of business. He must call on prospects at the convenience of the prospects, which necessarily involves irregular hours and absence from home at night and mealtime. Invariably the demands on an agent's professional life create a strained domestic situation unless the wife understands his work. An understanding and cooperative wife can and does increase the field of prospects for her husband, thereby increasing the volume of business of his employer as well as his own business. The insurance agent's wife's role in personal contacts, community projects, civic enterprises, and other areas of community life are of tremendous importance to the success or failure of the agent and therefore of his ultimate worth to himself and to his company. The wife can have a sphere of emphasis which may be narrow or wide, an area of acquaintance which may be narrow or great. If she plays an active part and understands her husband's work, her contribution will be greater. Therefore, the conventions held by Southland are so designed and prepared as to furnish a program which is also of instruction to the wife, whose attendance is highly desirable. So vital does Southland consider the

wife's part in its business that upon the employment of an agent the company requires an interview with the wife in the home to insure that she is made aware of the contribution which she may make to her husband's success. Southland has even distributed a booklet, *A New Partnership Has Been Formed*, evidencing its interest in stimulating the wife's role in the writing of insurance. Thus, in recognition of the wife's important role in a successful agent's career, Southland expects and urges the wives as well as the agents to attend such a convention inasmuch as Southland considers the wife's presence to be for a bona fide business purpose.

[fol. 11g] *Argument and Authorities*

1. Section 61 of the Internal Revenue Code defines gross income to include, among other things, "compensation for services including fees, commissions and similar items." Section 74 of the Internal Revenue Code defines gross income to include "amounts received as prizes or awards." Unless the benefits conferred by Southland upon taxpayers in respect of said convention trip be considered "compensation for services" or "prizes or awards", it is submitted that clearly no gross income would be realized by taxpayers in respect of said convention.

The fair value of transportation and subsistence furnished by an employer is not gross income to the recipient where furnished primarily for the benefit of the employer. See *Diamond* v. *Starr*, 116 F. Supp. 28 (DC, NDNY 1953); *Van Rosen*, 17 TC 834 (1951); *Arthur Benglia*, 36 BTA 838 (1937). The rule enunciated in these cases has been limited somewhat by Section 119 of the Internal Revenue Code of 1954 if the recipient is an "employee". However, C. J. Rudolph was an independent contractor rather than an employee in his relationship with Southland and therefore in determining whether the Rudolphs realized gross income by reason of Southland's furnishing to them transportation and subsistence in respect of this convention, the cases decided under the Internal Revenue Code of 1939 are applicable. Furthermore, these cases would likewise be applicable in determining whether Southland gave taxpayers

a prize or award by reason of their attendance at this convention.

[fol. 11h] If the recipient gets nothing that he can take, appropriate, use, or expand to his own dictates, it is not income notwithstanding that he may benefit thereby so long as such benefit is only incidental or secondary. *Van Rosen*, supra. "Income", for income tax purposes, is something of exchangeable value received by the recipient for his separate use, benefit, and disposal. *Midland Mutual Life Company* v. *Commissioner*, 83 F. 2d 629 (6th Cir., 1936), reversed on other grounds, 300 U.S. 216. A transaction whereby nothing of exchangeable value comes to or is received by the taxpayer does not create taxable income. *Hirsch* v. *Commissioner*, 115 F. 2d 656 (7th Cir., 1940).

There must be some power of disposition or power to procure payment to another in order to constitute income. *Helvering* v. *Horst*, 311 U.S. 112 (1940). There must be ability to enjoy or dispose of the gain before it is income since to be income the recipient must have control over its disposition. *Hulbert* v. *Commissioner*, 227 F. 2d 399 (7th Cir., 1955); *Paster* v. *Commissioner*, 245 F. 2d 381 (8th Cir., 1957). The test in determining whether payments to a taxpayer are income is whether such payments were received without restriction as to their disposition. *Clay Sewer Pipe Association* v. *Commissioner*, 139 F. 2d 130 (3rd Cir., 1943).

The doctrine of "constructive receipt" for income tax purposes should be cautiously and sparingly applied. *Commissioner* v. *Timken*, 141 F. 2d 625 (6th Cir., 1944). It has been said that the Government will not resort to sharp practice nor invoke technical construction or fiction which [fol. 11i] will manifestly thwart good faith intention of taxpayers for the purpose of visiting a taxable burden upon one who did not in fact, except by construction, derive any beneficial enjoyment from the transaction. *Randolph* v. *Commissioner*, 76 F. 2d 472 (8th Cir., 1935); *Bettendorf* v. *Commissioner*, 49 F. 2d 173 (8th Cir., 1931).

This last statement from the *Randolph* and *Bettendorf* cases epitomizes this case. It is fanciful fiction and technical construction to visit upon the the Rudolphs the burden of paying taxes on sums spent by Southland at its own

discretion and control without the consent or even consultation with the taxpayers. It was an expense the amount of which was unknown to the taxpayers and over which the taxpayers had no control. The taxpayers were under the compulsion of successfully performing their business for the employer in accepting the invitation of the employer to attend the convention, all arrangements of which were prepared and paid for by the employer.

Such conventions of life insurance companies are a part of the training program for their field representatives and are an ordinary and necessary expense of life insurance companies. In fact, Life Insurance Agency Management Association, an organization representing the agency departments of life insurance companies generally through the United States and Canada, has made studies of company practices in this regard and such studies have been published in three pamphlets, viz.: "Conventions" (1952), "Allowances for Transportation, Lodging and Meals to [fol. 11j] and from Company Conventions" (1956), and "Convention Qualification Changes" (1957). These studies show quite clearly the almost universal practice of life insurance companies in this regard and attest quite eloquently the desirability of such meetings for benefiting and advancing the interests of the company and the representatives of the company in attendance.

Taxpayers attended this convention primarily at the behest of Southland and it is clear that it was a business convention held by Southland to further its business and there was no intent by Southland that the benefit, if any, accruing to the Rudolphs be compensation or an award or prize. Accordingly, the taxpayers realized no gross income by reason of their attending said convention.

In the alternative, if the Rudolphs realized gross income by reason of said convention trip, the amount of such gross income is limited to $100, the fair market value of such trip. The Rudolphs would not have taken this trip had not Southland paid for it; it was not something they needed in the ordinary course of their lives and for which they would have made an expenditure in any event. Furthermore, their right or privilege to attend this convention was not salable or otherwise transferable and there were

substantial restrictions on even the manner in which they might enjoy such trip. Accordingly, under all the facts and circumstances, the fair market value of such trip was not in excess of $100. See Reg. Sec. 61-2(d)(1); Reg. Sec. 74-1(a)(2); *Reginald Turner*, 1954 TC Memo Op. Further, in the alternative, if the taxpayers realized gross income [fol. 11k] by reason of their attending said convention, irrespective of the amount thereof they are entitled to a deduction in the same amount against gross income for travel expenses incurred in connection with carrying on a trade or business.

Expenses paid or incurred by a taxpayer in attending a convention where he is benefiting or advancing the interests of his trade or business by such attendance are deductible expenses. Reg. Sec. 1.162-2(d). Likewise where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are deductible where her presence on the trip has a bona fide business purpose. Reg. Sec. 1.162-2(c).

An expense does not have to be absolutely essential to qualify as a necessary expense if the expense was incurred in consummating a transaction beneficial to taxpayer's business. *Commissioner* v. *Pacific Mills*, 207 F. 2d 177 (1st Cir., 1953). "Ordinary and necessary expenses" are not necessarily habitual or normal expenses in the sense that the taxpayer will have to make them often. *Welch* v. *Helvering*, 290 U.S. 110 (1933). The term "ordinary and necessary expenses" however must be given its natural and common connotation. *Tinkoff* v. *Commissioner*, 120 F. 2d 564 (7th Cir., 1941). An ordinary expense may be one which happens but once in the taxpayer's lifetime if it is of common or frequent occurrence in the type of business in which the expenses are incurred. *Deputy* v. *DuPont*, 308 U.S. 488 (1940). The test of a deduction made as an ordinary and necessary expense in carrying on a trade or business is said to be its natural normality and soundness as a business expenditure in both nature and amount by general commercial standards in practical applications to the specific situation. *Byers* v. *Commissioner*, 199 F. 2d 273 (8th Cir., 1952). The evidence of customs and actions of organized professional organizations is [fol. 11l]

relevant to the issue of whether certain expenses of a member of that profession at a given time and place are ordinary and necessary in computing taxable income. *Lilly* v. *Commissioner*, 343 U.S. 90 (1952). The exigencies of business rather than personal convenience must be the motivating factor for the incurring of the expense in order for it to be deductible. *Bercau* v. *Commissioner*, 165 F. 2d 521 (4th Cir., 1948).

In order that the expense of travel while away from home in pursuit of a business may be deducted, the expense must be incurred while away from home and must be a reasonable expense necessary or appropriate to the development and pursuit of a trade or business. *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). In this connection, the costs and expenses of attending a convention and other meetings have been held to be deductible in: *Wade H. Ellis*, 15 BTA 1075 (1929)—lawyer attending American Bar Association convention; *Marion D. Shutter*, 2 BTA 23 (1925)—clergyman attending convention of Universalist Church; *Alexander Silverman*, 6 BTA 1328 (1927)—university professor attending various scientific conventions; *Rita N. Callinan*, 1953 TC Memo Op.—secretary attending a convention of National Secretaries Association; *Charles O. Gunther, Jr.*, 1954 TC Memo Op.—accountant attending accountants' convention.

Consequently, if it should be determined that, contrary to taxpayers' contention, their attendance at such convention [fol. 11m] constituted gross income to the Rudolphs, they are entitled to a deduction in the same amount as such gross income by reason of the fact that attendance at such convention thereby constituted an ordinary and necessary expense of business constructively incurred by the taxpayers while away from home attending a convention or meeting which had a direct and substantial relationship between taxpayers' business and the convention; that such attendance was benefiting and advancing the business interest of the taxpayers' trade or business; that the convention was a business rather than a social, political, or other unrelated business purpose; and that Mrs. Rudolph's presence was for a bona fide business purpose.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed January 7, 1960

Comes now the defendant, the United States of America, and in answer to the complaint admits, denies, and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the complaint.

2. Admits the allegations contained in paragraph 2 of the complaint, except denies that plaintiffs have overpaid their income taxes and interests for the calendar year 1956, denies that the assessment of income taxes against plaintiff for 1956 was erroneous and denies that retention of said income taxes by defendant is illegal.

3. Denies the allegations contained in paragraph 3 of the complaint, except admits that plaintiffs filed a timely joint Federal income tax return for 1956 and paid the income taxes shown thereon to be due in the amount of $1,150.33.

4. Admits the allegations contained in paragraph 4 of the complaint, except that the date of payment was September 8, 1958.

5. Admits the allegations contained in paragraph 5. Except insofar as otherwise specifically admitted, denies each and every allegation of fact and conclusion of law contained in plaintiffs' complaint for refund.

[fol. 13] 6. Denies each and every allegation contained in paragraph 6 of the complaint and the subparagraphs thereunder.

7. Admits the allegations contained in paragraph 7 of the complaint.

8. Denies the allegations contained in paragraph 8 of the complaint.

Wherefore, defendant prays that plaintiffs' complaint be dismissed, and that judgment be entered for defendant

together with its costs and such other relief as this Court may declare for defendant.

W. B. West, III, United States Attorney, W. E. Smith, Assistant United States Attorney.

In the United States Court of Appeals

Defendant's Answer to Plaintiffs' First Amended Original Complaint—Filed September 7, 1960

Defendant for its answer to the First Amended Original Complaint:

I—VIII.

Repeats and reiterates its answers as found in paragraphs 1 through 8 of its original answer.

[fol. 14]

IX.

Denies the allegations of paragraph IX.

Wherefore, defendant prays that this action be dismissed with costs assessed against the plaintiff.

W. B. West, III, United States Attorney, W. E. Smith, Assistant United States Attorney.

Certificate of Service (omitted in printing).

Note Re Interrogatories

Defendant's Interrogatories to the Plaintiff C. J. D. Rudolph;

Answer of Plaintiff C. J. D. Rudolph to Defendant's Interrogatories;

Exhibit "A", 1956 Convention Booklet;

Exhibit "B", Agent's Contract, Southland Life Insurance Co.;

Omitted from the Printed Record pursuant to Designations as to printing Record heretofore copied at page 1.

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[fol. 15] Government Exhibit 1, 1956 Qualification Rules;

Omitted from the Printed Record being the same as Gov. Ex. 1 hereinafter copied at page 114.

• • • • • • •

Defendant's Interrogatories to Plaintiff Mrs. Irma M. Rudolph;

Answer of Plaintiff Mrs. Irma M. Rudolph to Defendant's Interrogatories;

Omitted from the Printed Record pursuant to Designations as to Printing Record heretofore copied at page 1.

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In the District Court of the United States

For the Northern District of Texas,

Dallas Division

Statement of Evidence

Appearances:

Turner, White, Atwood, McLane & Francis, Dallas, Texas, By Mr. McElroy, Appearing for the Plaintiff;

L. W. Vaseliades, Assistant to the Attorney General, Washington, D. C., Appearing for the United States of America.

[fol. 16] C. J. D. Rudolph, being first duly sworn, examined in chief by Mr. McElroy, testified as follows:

Direct examination.

By Mr. McElroy:

Q. State your name, please.
A. C. J. D. Rudolph.

Q. Where do you live, Mr. Rudolph?
A. 3501 Purdue, Dallas, Texas.
Q. How long have you lived there?
A. Since 1940.
Q. Did you live in Dallas County before that time?
A. Yes, sir.
Q. How long have you lived in Dallas County?
A. Since 1930.
Q. Are you married?
A. Yes.
Q. Is your wife in the Court room with you today?
A. Yes, she is.
Q. When were you married?
A. In 1921.
Q. Do you have a family?
A. Yes, sir.
Q. Are the children married now?
A. One child, yes, sir.
Q. Now, by whom are you employed?
A. Southland Life Insurance Company.
Q. What do you do for Southland Life Insurance Company?
A. I am an agent selling insurance.
Q. When did you first start working as an agent for Southland?
A. On September 14, 1932.
[fol. 17] Q. Have you been working for Southland ever since 1932?
A. Yes.
Q. Now, in connection with this case I want to ask you whether or not you filed your federal income tax return for the calendar year 1956?
A. Yes.
Q. Do you remember when you filed that?
A. It was probably before April 15th in 1957.

Mr. McElroy: I will ask the Court reporter to mark this as an exhibit, and also these checks, and also this other instrument.

(Said instruments marked Plaintiff's Exhibits 1, 2, and 3.)

By Mr. McElroy:

Q. I will hand you what the Court reporter has marked Plaintiff's Exhibit 1. Will you tell us what that instrument is?

A. That is a copy of the return we filed with the Internal Revenue.

Q. That is the one you filed for the calendar year 1956?

A. Yes.

Q. Then I hand you Plaintiff's Exhibit 2, being four checks. I will ask you to tell us what those canceled checks are, please, sir.

A. These checks total the amount of the tax due on my 1956 return. I am required to file an estimated return and three of them are estimates and the final check is the final balance of the tax.

[fol. 18] Q. I will ask you if the first check of the Exhibit No. 2 is in the amount of $366.87?

A. Yes, sir.

Q. Did you pay that April 14, 1956?

A. Yes.

Q. Then is the second check in the amount of $366.87?

A. Yes.

Q. Did you pay that on June 15, 1956?

A. Yes.

Q. And the third check in the amount of $366.86?

A. Yes.

Q. Did you pay it on September 14th?

A. Yes.

Q. And the final check $49.73?

A. Yes.

Q. Did you pay it on April 10, 1957?

A. April 13th.

Q. Now, I hand you Plaintiff's Exhibit 3 and ask you if that is the instrument by which you amended your estimate of tax for the calendar year 1956?

A. This typed form is, is the one that contains the amendment.

Q. Will you tell us why it became necessary for you to file an amendment which resulted in your paying a smaller check for the fourth check for this calendar year?

A. In May, 1956, I had an operation for cancer and, naturally, my activities were somewhat curtailed for some months and my income was less than I had estimated.

Q. Now, Mr. Rudolph, after paying the tax shown by the checks that you show here, did the government, by and through its District Attorney, or the Internal Revenue, [fol. 19] assess and determine a net tax deficiency for you for the year 1956?

A. Yes, they did.

The Court: I take it the matters you ask about are not in issue; they are not controverted?

Mr. Vaseliades: No, we admit that deficiencies were assessed in the amounts alleged.

Mr. McElroy: Then, may I introduce the exhibits, if there is no controversy, in order to have them in the record?

The Court: Yes, you can do so, or they might be covered by stipulation, but go ahead.

Mr. McElroy: I will ask that this instrument be marked, and also this letter, and another letter, and this claim, and another instrument here which I have in my hand.

(Said instruments marked Plaintiff's Exhibits 4 through 8, inclusive.)

Mr. McElroy: Now, Your Honor, upon stipulation by counsel, and acting on the Court's instruction, without further evidence from the plaintiff, I now offer in evidence these exhibits, 1 through 4, inclusive, consisting of the jurisdictional phase of the case, No. 4 being the deficiency statement showing $137.09, being the tax plus $10.19. Then [fol. 20] Mr. Rudolph's check in payment of that sum of $137.09, which is the amount in controversy.

Then Exhibit 5 is the letter from the government to Mr. and Mrs. Rudolph in which the government states the notice of disallowance of his claim for refund.

And No. 6 is a letter of transmittal by a lawyer in our firm showing the claim for refund which was forwarded, and No. 7 is the claim for refund itself, and No. 8 is the complaint filed in this case, showing it was filed October 9, 1959.

Mr. Vaseliades: Of course we stipulate as to the admissibility of these documents but not as to the truth of any matters that might be contained therein.

The Court: Nor as to any conclusions that the Court might draw from them.

Mr. Vaseliades: Yes.

Mr. McElroy: I will also have this instrument marked.

(Said instrument marked Plaintiff's Exhibit 9.)

By Mr. McElroy:

Q. Now, Mr. Rudolph, I hand you Plaintiff's Exhibit 9. I will ask you if you will tell us what that instrument is?

A. That is my agency contract with Southland Life Insurance Company.

[fol. 21] Q. Is this the contract under which you went to work for Southland, and with modifications, have been working under it ever since?

A. That is right.

Mr. McElroy: We offer it in evidence.

(Said instrument offered in evidence, marked Plaintiff's Exhibit 9.)

By Mr. McElroy:

Q. Now, Mr. Rudolph, I want you to tell us about this convention, and the basis upon which you personally attended this convention.

A. One of the requirements for being eligible to attend the convention was we write at least $400,000.00 in life insurance. There is always a minimum set because only those that can write a reasonable amount of business would benefit from going to the convention.

Q. Now, after you received notice that you and your wife had qualified to attend tell us how the arrangements were made by which you went up there.

A. All the arrangements were made by Southland Life Insurance Company.

Q. Did you have anything to do with whether you went by train or airplane or automobile?

A. We had to go by train.

Q. Do you remember what railroad it was that carried you there?

A. I am not sure.

Q. Did you leave from Dallas?

A. Yes, sir, in two special trains.

Q. Did the trains take you to New York City?

[fol. 22] A. They took us to New Jersey and we ferried across to New York.

Q. Were all those arrangements made by Southland without consultation with you and your wife?

A. Yes.

Q. Were the accommodations by Southland, without consultation with you or your wife?

A. Yes.

Q. Was the time set by Southland, without talking with you?

A. Yes, sir.

Q. Now, with regard to the actual payment of the expenses, both as to transportation and as to your expenses in New York City, did you make these payments or did Southland make those payments?

A. The transportation and hotel and most of the other expenses were paid by Southland.

Q. Did Southland give you some pocket money to handle miscellaneous and other expenses?

A. They gave us a check for $30.00 with which my wife and I were to buy meals which had not been planned by Southland.

Q. When was that given to you?

A. Before we left Dallas.

Q. By check or cash?

A. In a check.

Q. Did you spend that money for the purposes for which Southland had given it to you?

A. Yes, sir.

Q. Now, with respect to this convention, did they have various speakers as part of a business program, once you arrived in New York City?

A. Yes.

Q. Can you tell us who those speakers were?

A. Well, I think I know all of them.

[fol. 23] Q. Tell us who they were, please.

A. Ben H. Carpenter, who at that time was vice-president.

Q. Executive vice president?

A. Yes, sir. John W. Carpenter, who was Chairman of the Board; Dan C. Williams, who was President of Southland Life, and Glenn Brooks; I don't remember what his title was.

Q. Was he the vice president and director of A & H Insurance?

A. That is right, and then we had a panel discussion which was headed by Herman Ford, in which four of the agents participated. One of them was Huffbarr, Jim Whitmeyer, Sully Woodum, and Johnny Wright.

Q. Now, was this begun on the morning after your arrival in New York City?

A. Yes, sir, it was that morning.

Q. At what hotel did you stay there?

A. The Waldorf-Astoria.

Q. And were these parts of the program put on at a meeting in that hotel?

A. Yes, sir.

Q. Then did you later attend a lunch at that hotel in New York?

A. Yes.

Q. Do you remember who delivered the talk at that time?

A. Norman Vincent Peale.

Q. In respect to the programs you have told us about and the speeches, did they have to do with telling you how you could enjoy the city, or did they have to do with the company business and telling you various matters in respect to the company's policy, and what had been done all through the past year?

[fol. 24] A. The talks were primarily on that altogether, and to help us in improving ourselves so we could do a better job selling for Southland Life.

Q. Was this convention, and were the programs represented to you by Southland Life as part of the agency training program of Southland?

Mr. Vaseliades: I had rather hear from the witness; they are very leading questions.

The Court: Well, there is no jury, and the Court will try to consider it in the light of your objection.

Mr. McElroy: Will you answer the question?

A. Will you repeat it?

By Mr. McElroy:

Q. I will ask you whether or not these various features at the convention and at the program were represented to you as being part of the agency training program?

A. Well, they are definitely a training program.

The Court: I take it that some officer of the company will testify to the purpose of the convention and the trip?

Mr. McElroy: Yes, Your Honor.

[fol. 25] The Court: So you need not go into the case as fully as you otherwise might, since you are going to offer them.

By Mr. McElroy:

Q. Was your attendance and the attendance of your wife at this convention required by Southland?

A. Yes.

Q. Now, if you had not attended do you suppose you would have been dismissed from their service, or would your non-attendance have been frowned upon, or what would have been the result?

A. Well, you are expected to go and enter into the programs that the company has for you. We have certain training programs we have to abide by, and these conventions are expected of the agents who write enough business to go.

Q. Did the convention itself promote your knowledge and your skill and your technique and ability as an insurance agent?

Mr. Vasiliades: I object to the nature of the question.

The Court: I might modify the question to this extent: Is it your opinion and your judgment that the training program given at this meeting was helpful in qualifying you for your service as an insurance man?

The Witness: Definitely; yes, sir.

[fol. 26] By Mr. McElroy:

Q. Tell us whether or not you had occasion up there to talk with other agents in respect to how they go about selling for Southland.

A. The panel was primarily that, the panel discussion was had by agents who had been successful, or done a successful job for Southland Life Insurance Company. And they not only told us how they did it, but they also told us to what extent their wives entered into helping them in their business, and then we rubbed elbows with other successful men and, naturally, when we do that we always have discussions on cases, how to close cases and what was recommended, and things of that kind.

The Court: What was the particular service you did for which this money was required?

The Witness: Well, I don't think it was a requirement, but you had to write a certain amount of business before they considered you well enough informed in the insurance business to grasp what they gave you there.

The Court: Did they give it to all of the employees?

The Witness: No.

The Court: If you had not taken the trip would you have been entitled to the cash money without making the trip?

[fol. 27] The Witness: No.

The Court: Go ahead.

By Mr. McElroy:

Q. Now, the planned part of this convention in regard to the speeches and the program you have told us about covered a great part of the time you were there, or not a great part of the time you were there?

A. Well, it depends on what you call a great part; the program was balanced.

Q. What I am getting at is this: In addition to the official formal program of the convention did you have occasion in New York City, and with these other officials and agents, to talk to them informally from time to time?

A. Yes, sir, not only in New York City, but on the train up and back.

Q. As a matter of fact, the Southland sometimes has articles appearing in its company organs or literature, to show how one agent benefits from talks with another agent?

A. Yes.

Q. And did that occur in New York City?

A. Yes.

Q. What do we mean when we hear, "It worked for me;" what is meant by that?

A. Well, what works for one agent very often works for another. If an agent works a certain way, calls on a certain type person, develops them in a certain way, those things are always brought out, and some agent may do it different from what I do, and it may help me.

[fol. 28] Q. And are there better facilities in obtaining that type knowledge at a convention than working here in Dallas trying to sell insurance?

A. There is no other way you can get that information.

Q. Tell us whether or not the various plans, and the various programs, and the evening at the Copacabana prevented you from attending those business programs, or instructions, or information that the company has sought to achieve.

A. The company planned those events in such way that they would not interfere with the business, and they did not.

Q. Now, will you tell us as briefly as you can, and we will call on the company's philosophy with reference to your wife's cooperation with you as an agent working for the company.

The Court: Let's see if I understand your question. Do you want him to tell the company's philosophy and reason for taking his wife?

Mr. McElroy: In so far as he would know as an agent.

The Court: I believe I will exclude that.

By Mr. McElroy:

Q. Have you attended various conventions by Southland in the past?

A. Yes.

Q. Has your wife attended those conventions with you?

[fol. 29] A. Yes.

Q. Did she attend this convention with you?

A. Yes, sir.

Q. Did she attend the various speeches and the official program you have told us about?

A. Yes, the wives were required to.

Q. She sat through the business portion of it and was not away during those times?

A. That is correct.

Q. Was there any special feature for her, involving a lady's fashion show?

A. She didn't attend that.

Q. What was she doing at that time?

A. It was our only opportunity to visit the United Nations Building and we went over there instead.

Q. During the time you were trying to talk with these other agents as to how they were selling and conducting their business was your wife then with you?

A. Most of the time.

Q. The conventions are not held annually, are they?

A. No, sir.

Q. How often does Southland have a convention?

A. About every 18 months.

Q. During the time prior to the time you went to the convention in New York would there be various reports of a periodical nature sent to your home by Southland?

A. Yes.

Q. Would your wife read those?

A. Yes, sir.

Q. Would the company, in this literature, treat your wife as an employee just like yourself?

A. The wife is considered a partner of the agent.

[fol. 30] The Court: Just one question.

Did the Southland have other representatives there besides you?

The Witness: Yes, sir.

The Court: About how many?

The Witness: I think altogether there were 293 in attendance at the convention.

The Court: All employees of Southland?

The Witness: Yes, sir.

The Court: Why couldn't they have had the meeting in Dallas instead of New York City?

The Witness: I can't answer that.

The Court: I was under the impression that a number of insurance companies had a convention and that you perhaps represented the Southland at the convention, but it was just a convention of the employees of Southland?

[fol. 31] The Witness: Agents and employees.

Mr. McElroy: We will answer Your Honor's questions through some of Southland's officials.

The Court: I think you are going into unnecessary details. Much of it will be inferred from the testimony.

By Mr. McElroy:

Q. I believe the Court has covered this, but if you had not gone to the convention would you have received another trip some other time?

A. I would have received nothing.

Q. Would you have received any money?

A. No, sir.

Q. Any pension or fringe benefits?

A. No.

Q. You didn't determine where this convention would be held, did you?

A. No, sir.

Q. Did you have any control at all over the program in New York City?

A. No, sir.

Q. Did you have any control over the time of the meeting in New York City, or the place of the meeting up there?

A. No, sir.

Q. Do you know of your own knowledge that this type of convention is a common occurrence in the life insurance industry?

A. Yes, I understand all companies have some program of that type.

[fol. 32] Q. I believe you told us in this year, near the end of that year you were suffering from a serious disease?

A. In May of that year.

Q. Can you tell us whether or not you had so recovered

that you would ordinarily have been taking a vacation at that time, rather than staying in Dallas?

A. No, I talked with my doctor before I took this convention trip and he said he thought it would be all right for me to go, but I wouldn't have gone anywhere else.

Q. You would not have gone for a vacation at that time?

A. No.

Q. By way of taking vacations, what do you like to do?

The Court: Are you anticipating something they were going to do? If you are, let them bring it out.

Mr. McElroy: All right, Your Honor, we are through with this witness.

Cross examination.

By Mr. Vaseliades:

Q. At this time you had been an agent selling insurance for Southland about 28 years?

A. Yes.

Q. Did you sell insurance before that time?

A. No.

[fol. 33] Q. Your counsel has offered into evidence as Plaintiff's Exhibit 6 a copy of that contract, approximately with the terms of that contract?

A. Yes, sir.

Q. Is there any provision in the contract requiring you to attend conventions?

A. No.

Q. How many conventions have you attended, approximately?

A. I know I have attended ten since 1938; I am not sure prior to that.

Q. Did you attend a convention in 1940 at Estes Park, Colorado?

A. Yes.

Q. Did your wife attend?

A. She was ill at that time.

Q. Your wife did not attend?

A. No.

Q. Did you attend one the following year in Mexico City?

A. Yes.

Q. How about one in 1949, in Havana, Cuba; did you attend that?

A. Yes.

Q. Did you attend the one that was held in Canada in 1953?

A. Yes.

Q. Did your wife attend?

A. Yes.

Q. And another one in New Orleans in 1954, is that right?

A. Yes, sir.

Q. Did you attend that one?

A. Yes.

[fol. 34] Q. Now, this particular convention in New York City, as I understand it you left Dallas by train on December 11th, is that right?

A. I am not sure of the date; we left by train.

Q. How many days all told did this convention trip occupy?

A. Eight or nine.

Q. Eight or nine days?

A. Yes, sir.

Q. How many business sessions were scheduled during those days?

A. We were not in New York during all those days.

Q. I said how many business sessions were scheduled?

A. One, and a luncheon.

Q. How long did that last?

A. All morning, and we ran over lunch time. I am not sure, three or four hours.

Q. By all morning do you mean from 9:30 until noon?

A. I am not sure when they started.

Q. Did they start at 7:00 in the morning?

A. No.

Q. Was it later than that?

A. It was a reasonable time; I am not sure when.

Q. That was on the day after you arrived in New York City?

A. No, we arrived in New York City after dark the day before.

Q. Then the next day you had this business meeting that lasted for two or three hours?

A. Yes, sir, at least three; probably three or four.

Q. You didn't stop for lunch?

A. We had lunch but it was late when we got it.

[fol. 35] Q. Now, other than those hours there, were there any other business sessions during this convention?

A. The noon luncheon.

Q. That noon luncheon on the same day, is that what you refer to?

A. I think it was the same day.

Q. You testified you had no control over the activities. How was it you and your wife got out of attending this ladies luncheon?

A. It was not a luncheon, it was a breakfast. It was a fashion show that had nothing to do with business.

Q. In other words, it was not mandatory for her to go?

A. It was a matter of choice; none of them had to go.

Q. And you exercised your choice, you and your wife, and she didn't attend?

A. That is correct.

Q. Going back for a minute about how you qualified to attend this convention. When did you first learn that there would be such a convention in New York City?

A. I am not sure of the date. Sometimes they announce that at the preceding convention, but I am not sure whether this one was announced or not.

Mr. Vaseliades: Mark this as Government's Exhibit 1.

(Said instrument marked Government's Exhibit No. 1.)

[fol. 36] By Mr. Vaseliades:

Q. Can you give us an approximation of how long before the convention you were aware the convention would be held in New York City?

A. I don't remember that.

Q. I show you what has been marked as Government's Exhibit 1 and ask you if you can identify that.

A. Yes, sir, this looks like a photostatic copy of a book in which they set forth the amount of business we were required to write in order to be eligible to go.

Q. Did you receive such a copy?
A. I am sure I did.
Q. When did you receive that, approximately?
A. I just don't know.

Mr. Vasiliades: We offer in evidence Government's Exhibit 1.

By Mr. Vasiliades:

Q. Did you read over these rules, Mr. Rudolph?
A. Yes.
Q. Why?
A. Well, any time we get any correspondence it is customary we read what the company wants us to know.
Q. Well, you see on the front page in big writing "1956 Convention Qualification Rules", is that correct?
A. Yes.
Q. Now, was your interest aroused in the convention for 1956?
A. Well, naturally, as they always are.
Q. Did you look forward to go to this convention?
A. Sure.
Q. Did you talk to your wife about it as soon as you found out about it?
[fol. 37] A. Sure.
Q. Was she anxious to go?
A. Yes.
Q. Did you plan for it?
A. Yes.
Q. Did you have any difficulty in meeting the requirements to qualify for the convention?
A. To some extent, yes, because of my physical condition.
Q. You felt, however, that you desired to go to this convention, did you not?
A. Yes.
Q. Did you make additional efforts to meet the qualifications in order to attend the convention?
A. I don't know that I made undue effort.
Q. I didn't say undue effort.
A. You said special.

Q. You said you were having trouble meeting the qualifications.

A. I was in the hospital for two weeks, then I had to take out time, about two or three months more. With that much time out it is not as easy as it would have been otherwise.

Q. There was a time when you were worrying about whether or not you would make the qualifications?

A. Not too much worry; I wrote more than the minimum requirement.

The Court: Did the company pay you a bonus at the end of the year or during the year at any time in addition to this trip?

The Witness: No, sir.

[fol. 38] By Mr. Vaseliades:

Q. After this business session of one day that lasted from 9:00 or 9:30 until 12:00, or through the lunch period, what happened that afternoon?

A. I believe they had a sightseeing trip planned for us at that time.

Q. And on that sightseeing tour you went by Rockefeller Center and Central Park and Grant's Tomb, and all of those places; did you pass all those places?

A. We didn't go as far as we intended to because it was pouring down rain during that trip.

Q. You got to see downtown Manhattan, did you not?

A. We saw that on the way to the hotel.

Q. Did you go past the United Nations Building?

A. No.

Q. Well, after you returned to the hotel what was the next event on this schedule?

A. I think it was Copacabana.

Q. I don't understand you.

A. I think it was the evening at Copacabana, I am not sure; I think it was that evening.

Q. Well, would it refresh your memory if I told you the evening at the Copacabana was the following day?

A. I guess I just probably had a free evening, then.

Q. There was nothing planned as far as you can recollect?

A. No.

Q. How about the next day, December 15th, what was scheduled then?

A. What day of the week was it?

Q. This is the day after your sightseeing tour, that is when the breakfast and the fashion show for the ladies was scheduled, was it not?

[fol. 39] A. Yes.

Q. And you didn't attend that?

A. No.

Q. Neither you or your wife?

A. No.

Q. What did you do instead? I believe you said you went to the United Nations?

A. Yes.

Q. How long were you at the United Nations?

A. We took the tour.

Q. Did it take more than the morning?

A. Yes.

Q. Where did you have lunch?

A. I don't remember.

Q. It was not a planned event?

A. No.

Q. You paid for your lunch out of the money which the company had advanced you?

A. That is right.

Q. And that evening you attended the Copacabana, is that correct?

A. On the 15th?

Q. Yes.

A. Yes.

Q. Was there a show available there for you to see?

A. We went at an early hour, but they had some entertainment.

Q. What did it consist of?

A. They had singers and dancers.

Q. How long were you at the Copacabana?

A. I would say a couple of hours; we had to get out of there to make room for the regular crowd.

Q. In other words, that entire day there was no business session, is that correct?

[fol. 40] A. I think that is right.

Q. How about the next day; what was on the schedule?

A. That is when we left for home.

Q. What time did you leave for home?

A. We left the hotel at, I imagine, about 9:00 o'clock.

Q. So, then, the only business session was this morning, the day after your arrival, is that correct?

A. The only business session in New York was there.

Q. Who else was along? I mean what type of individuals were in attendance at this convention?

A. The agents and the officials of the company.

Q. Where were they from, as a rule?

A. The officials were mostly from Dallas; the agents were from over the entire territory.

Q. Describe the territory for me. How much geography, or what country does it cover?

A. I am not just sure how many states there are.

Q. The southwest?

A. It goes from coast to coast.

Q. Where were the agents from?

A. I remember some from the west coast; most of them from Texas and Oklahoma.

Q. Most of them from Texas and Oklahoma?

A. And Arkansas.

Q. Did you take anyone with you besides your wife to this convention?

A. No.

Q. You don't consider your wife as an employee of yours, do you?

A. An employee of mine?

Q. Yes.

A. No.

[fol. 41] Q. You could have qualified for this trip regardless of whether you were married or single, could you not?

A. Yes, sir.

Q. Were there any single agents there?

A. Yes.

Q. And you could have qualified for this trip regardless of what your wife did or failed to do, could you not?

A. I will say this: The agents that were singled out to write the same amount of business I did.

Q. You, as a married man, could qualify for this convention irrespective of what your wife did or failed to do, could you not?

A. She could help me.

Q. Will you answer the question?

A. I could have gone, yes, without her going.

Q. You could have qualified irrespective of what your wife did or failed to do?

Mr. McElroy: He has testified his wife helps him, and I believe that is an answer to the question.

The Court: There is evidence to show that the presence of the wife along with the husband tended, perhaps, to interest her in his business and thereby indirectly give him some encouragement.

I will hear the evidence.

By Mr. Vasiliades:

Q. How long have you been married?

A. Since 1921.

Q. 39 years?

A. Yes, sir.

[fol. 42] Q. Your wife is a good partner, I am sure, is she not?

A. I have an office at home and she helps me.

Q. Are you satisfied with your job as an agent of Southland?

A. Yes.

Q. Are you planning to retire soon, Mr. Rudolph?

A. No.

Q. Now, in Dallas you have ample opportunity to converse with your cohorts and superiors in the insurance business, do you not?

A. Yes.

Q. Do you actually do so?

A. Yes, sir.

Q. There is nothing unusual about these opportunities, so to speak, in New York City, as far as opportunities to converse and discuss the insurance business?

A. Yes, there is.

Q. Unusual, in that you have to work 'em in around the social and entertaining, is that right?

A. No, sir. What is unusual about it is that our largest producers do not live in Dallas.

Q. Where do the largest producers live?

A. In Austin, Tyler, Houston, and when they get to Dallas I don't get a chance to see them.

Q. What type agent are you?

A. Selling insurance.

Q. Are you an ordinary agent?

A. Yes, sir, ordinary agent.

Q. You are not a combination agent?

A. No.

Q. Do you have any supervisory capacity?

A. No.

[fol. 43] Q. Now, were you periodically informed in any manner as to your standing, as far as this test of qualification goes?

A. Yes, sir, every month.

Q. Every month?

A. Yes, sir.

Q. How were you informed?

A. They get out a bulletin showing the standing.

Q. They show the standing of all of the agents as to how much insurance they have sold?

A. No.

Q. How is it handled?

A. It shows those that have actually written enough to be invited.

Q. Was this posted publicly?

A. No; it was mailed to us in monthly magazines.

Q. In a monthly magazine?

A. Yes, sir, we get it from the company.

Q. These magazines went to all of the agents?

A. At their homes.

Q. It was an incentive to you to get your name in there, was it not?

A. I was glad to see it in there when it got there.

Q. In fact, this whole trip was an incentive to you, was it not?

A. Not altogether.

Q. I assume by that you mean partially?

A. Naturally, you liked to be among the top men of the company, when the top men were invited.

Q. In other words, this was something you would receive if you produced, is that correct?

A. It was not something I received because I produced; I had to produce a certain amount in order to receive it.

[fol. 44] The Court: Did all of the agents go on the trip?

The Witness: Only those that were considered good enough.

The Court: Now, there was to be a distinction between an agent that could go and one that could not go. What was that distinction?

The Witness: Well, they had to be capable of writing a certain amount of business, just so they made the full $400,000.00.

The Court: It was conditioned on the amount of business done?

The Witness: Yes, sir.

By Mr. Vasilades:

Q. You say you didn't attend at least one convention in the past. What penalty did you have to pay for that?

A. I didn't say that; I have attended all conventions.

Q. You attended all of the conventions since 1932?

A. Yes.

Q. Didn't you testify you couldn't recall past 1940 whether you attended or not?

A. I said I didn't know how many were held, but I attended all of them.

[fol. 45] Q. Anyway, now you are testifying you did attend them all?

A. I didn't say I had not attended.

Q. Well, have you attended all of them or not?

A. I attended all of them.

Q. How many has your wife attended?

A. All but two.

Q. Now, suppose you did not attend this convention in 1956. You had been working for Southland 24 years in 1956, is that right?

A. Yes.

Q. How was your production figures compared with those of your contemporaries?

A. I am not aware of their production figures.

Q. Now, you say that this was not a requirement of you, I believe you testified. Would you call it a penalty?

A. No.

Q. In other words, they didn't have to carry you up to New York City screaming and kicking?

A. Sure.

Q. Would you go again tomorrow if it were offered?

A. If I had my expenses paid, yes, sir.

Mr. Vaseliades: That is all.

Redirect examination.

By Mr. McElroy:

Q. Counsel asked you about your agency contract. Tell us whether or not it actually provides you must comply with the rules and regulations of the company.

A. They can terminate the contract on short notice.

[fol. 46] Q. Is that also a fact, do you have any contract with Southland whereby they cannot fire you or where they have to employ you any number of years?

A. No.

Q. Would we generally call the contract terminable at will?

A. Yes, I think that is it.

Q. Would it follow you would be interested in maintaining the good will of the company toward you?

A. Yes.

Q. And try to attend their conventions if they ask you to?

A. Yes.

Q. If you had wanted to take a vacation trip somewhere would you have gone where the company personnel were?

A. Whenever I take a trip I like to get away from it all, not have any schedule, and do as I please.

Q. At this convention was there any drinking or consumption of alcoholic beverages paid for by Southland?

A. No, sir, definitely not.

Q. Southland did not have a waiter bring in the champagne and the scotch and sour and the rest of it?

A. No, sir.

Q. Tell us how your wife helps you in your business and at this convention.

A. She is sort of my eyes and ears; she knows people who are buying new homes, and new babies; sometimes introduces me to people I would like to meet, and in a general way, and then she helps me with my records.

Q. Does she make an attempt to inform herself as to the company's practices and policies and methods of handling [fol. 47] its business and selling, from a technical sense?

A. Not selling; she wouldn't make a very good saleslady, but she does know what type of people need insurance and advice.

Q. If a convention was held in Dallas, or without a convention, counsel asked you about your opportunity of conversing here in Dallas with your cohorts and officials. Tell us whether in getting away from Dallas and going to a place like New York City, would your interest be stimulated in the company's business?

A. Definitely, yes, sir.

Q. At such a convention in such a city would you be more likely to be interested in talking with various agents as to how they did their business?

A. We have more of an opportunity to.

Q. Would you actually have more time away from your home to devote to the company's affairs, talking to these people in groups?

A. Yes, sir. If a convention was held here perhaps I would spend about half my time in taking care of my business here.

Mr. McElroy: That is all.

Recross examination.

By Mr. Vaseliades:

Q. Mr. Rudolph, how long a vacation do you normally take?

A. It varies; a week or two weeks.

Q. Do you have a favorite spot you go to?

A. I visit my sister in Indiana frequently.

Q. Anywhere else?
[fol. 48] A. No.
Q. You go to Indiana to see your folks?
A. Sometimes.
Q. How about the other times?
A. I just get in the car and drive.
Q. Where have you ended up occasionally?
A. Arkansas, Louisiana; not very far.
Q. Do you know why supper in New York City was held at the Copacabana Night Club?
A. No.

Mr. Vaseliades: That is all.

Kenneth B. Skinner, being first duly sworn, examined in chief by Mr. McElroy, testified as follows:

Direct examination.

By Mr. McElroy:

Q. State your name.
A. Kenneth B. Skinner.
Q. Where do you live?
A. Dallas, Texas.
Q. Wher abouts?
A. 6131 Meadow Road.
Q. How long have you lived in Dallas County?
A. Approximately 20 years; I am not sure.
Q. Are you married?
A. Yes.
Q. By whom are you employed?
A. Southland Life Insurance Company.
[fol. 49] Q. How long have you been employed by Southland?
A. Approximately 15 years.
Q. What is your position with Southland?
A. Vice president and agency director.
Q. In connection with the discharge of your duties with Southland did you have occasion to work up the various details of the convention held in New York City in 1956?

A. Yes, I did.

Mr. McElroy: Mark these instruments.

(Said instruments marked Plaintiff's Exhibits 10 and 11.)

By Mr. McElroy:

Q. Mr. Skinner, I hand you what the Court reporter has marked Plaintiff's Exhibit 10. I will ask you to look at that exhibit and tell us what it is.

A. This is a brief schedule of events in New York City at the time of this convention.

Mr. McElroy: I offer Plaintiff's Exhibit 10 in evidence.

By Mr. McElroy:

Q. Did you, along with other officials at Southland, assist in the preparation of that schedule of events at the convention?

A. Yes.

Q. I will ask you to look at this instrument, Plaintiff's Exhibit 11, and tell us what that is.

[fol. 50] A. That is a schedule of the morning meeting, Friday morning, December 14th, in New York City.

Mr. McElroy: I offer in evidence Plaintiff's Exhibit 11.

The Court: The address of welcome was by Mr. Carpenter?

The Witness: As I recall, yes, sir.

The Court: He lives in Dallas?

The Witness: Yes, sir.

By Mr. McElroy:

Q. Mr. Skinner, will you tell us what the purpose was of holding this convention in New York City in 1956?

A. The purpose of the convention was to have the opportunity or method of communications to our sales force as to the company's objectives and plans, and the exchange of ideas in the methods of successfully selling life insurance.

Q. Tell us whether or not you were intending to single out certain men and award them with a prize or an award of some kind.

A. That was not the purpose.

Q. Of course, if the man actually enjoyed themselves on this trip you wouldn't object to that?

A. No, sir, that would be gratifying, if they did enjoy it. [fol. 51] Q. Would it be a better meeting if along with the exchange of ideas and that sort of thing at the convention, you would also have some moments of entertainment and pleasant surroundings?

A. In my opinion it would make it more effective, yes.

Mr. McElroy: Mark these instruments.

(Said instruments marked Plaintiff's Exhibits 12, 13, 14, and 15.)

By Mr. McElroy:

Q. I am going to hand you Plaintiff's Exhibit 12. I will ask you whether or not this instrument was prepared under your supervision and instruction.

A. Yes, it was.

Q. And was it sent to you by an official at Southland?

A. Sent from an employee.

Q. What is the nature of this instrument?

A. It is a memorandum to me giving the number of men we have in various status of employment with the company, which attended the convention in New York in 1956, that is, as agents, field assistants, managers, office officials, and different categories.

Q. Do these figures show that the wives normally responded to the invitation by the company and attended?

A. Yes, it shows 151 men attended and 142 wives attended.

Q. Do you know whether or not the men who are not shown to have attended with their wives are all married?

[fol. 52] A. I know some are single; I don't know the exact number.

Q. Tell us whether or not in your opinion as an agency director for Southland these figures show or indicate to you that the wives regard their attendance as being important to their husbands and to the company.

Mr. Vaseliades: I object to that. I don't see how this witness can testify as to what the wives think. If they

chose to have the testimony of the wives I think that might be different, but this witness is not a wife.

The Court: Well, sometimes men think they know what their wives think. I am not sure what the purpose is, but I am hearing it for whatever it is worth.

Go ahead; I will hear you.

By Mr. McElroy:

Q. Do the fiures indicate to you whether or not the attendance of the wives was considered important?

A. It indicates to me that it was considered important, and apparently the wives so considered it because practically all of them did attend.

Mr. McElroy: I offer the exhibit in evidence.

Mr. McElroy: I will say to the Court in this connection that although Mrs. Rudolph is here in the Court room, the wife of the taxpayer, we do not intend to call her as a witness, primarily for reasons of her health, but if [fol. 53] the Government wants to call her she is here and will be glad to answer any questions they put to her.

Mr. Vasiliades: But this witness testified about the wives' attitudes and opinions and so forth.

The Court: Well, the Court is weighing it.

Mr. Vasiliades: It is an attempt to have me call Mrs. Rudolph as a witness, and when he gets the testimony in through a third party I am denied the opportunity to cross examine.

The Court: We will have to get down to the question.

Mr. McElroy: Actually, I have no question.

The Court: I don't think the evidence is admissible. I am admitting it, however.

Now, as to this letter, this is a letter signed by the agency secretary, addressed to "Dear Ken." Is that you?

The Witness: Yes.

The Court: It is a breakdown of the 293 Southland people who attended the New York convention in 1956. Agents, [fol. 54] men, 102; wives 97; salaried field assistants 3; wives 3; assistant managers 2 and wives 2; manager, 17 wives 17; officers 27, wives 23, a total of 151 agents and wives number 142.

Now, this mentions the classification breakdown. I believe it is in evidence here that some of the agents were eligible to go and some were not. What was it made an agent eligible to attend one of these conventions?

The Witness: He had to be invited by the company to go.

The Court: What was it that induced the company to extend these invitations?

The Witness: We were induced to have the convention and invite the agents to the convention for reasons of instructions.

The Court: Did the amount of business produced control the matter?

The Witness: To a very great extent. It was a consideration, and a very important consideration.

The Court: Say a man produced during the year $20,000,00 worth of business and another one produced $80,000,00 worth or $100,000,00 worth; was there any limit on the amount a man had to produce to get into this group? [fol. 55] The Witness: Yes, there was a certain minimum amount an agent had to produce in order to be considered for the trip.

The Court: Do you remember the amount?

The Witness: It varied, depending on the length of time he had been under contract.

The Court: What would you say would be the minimum?

The Witness: I believe there were some that attended who had produced as low as $10,000,00 or less; I don't recall for sure on that.

The Court: Now, did you ever hold one of these conventions here in Dallas?

The Witness: Since I have been with the company we have held one here, which was last year.

The Court: Now, you have held them, I believe, in Denver?

The Witness: I don't recall Denver.

The Court: One in New York?

[fol. 56] The Witness: Yes, sir.

The Court: And one in Havana, Cuba?

The Witness: Yes.

The Court: And one in the City of Mexico?

The Witness: Yes.

The Court: Do you recall any other places they have been held?

The Witness: New Orleans, Houston, San Antonio, Coronado, California. I believe that is all that have been held during the time I have been with the company. That is all I recall offhand.

The Court: All right. Take the witness.

By Mr. McElroy:

Q. What is Mr. Edmondson's position with the company?

A. He is agency secretary.

Q. In that position did he have available to him the various dollar costs of the various items of expense for this convention?

A. Yes, sir.

[fol. 57] Q. Was he able to determine for you the amount of cost that would be attributable to transportation?

A. Yes.

Q. And to entertainment?

A. Yes.

Q. I will ask you if Plaintiff's Exhibit 13 is a breakdown showing the average cost per person, and per couple, attending the convention of those various expenses paid by Southland?

A. Yes, it is.

Mr. McElroy: I introduce it into evidence as Exhibit 13.

Mr. Vasiliades: We agree that this document is admissible as an interoffice memo of the company, but we object if it is being introduced to show the truth of the matter stated therein.

The Court: If we eliminate the truth therein shown you might as well have a blank sheet.

Mr. Vasiliades: I would say the same thing.

The Court: It says here the average cost is $543.80. Is that the amount on which the income tax is sought to be collected?

Mr. McElroy: Yes, Your Honor, as best we could calculate it for the individual involved.

[fol. 58] Mr. Vasiliades: I would say actually $560.00, and I think we did stipulate that that amount was correct.

Mr. McElroy: We stipulated $560.00, but I think if you will look at the bottom paragraph you will see an additional expense of $17.00 which I added on to the $543.00.

The Court: As I understand it, you have already stipulated it and the tax has been paid and you are suing for the return of that exact amount, is that correct?

Mr. McElroy: That is correct.

The Court: Then you are suing back for what you have paid?

Mr. McElroy: Yes.

The Court: If that amount is stipulated, then what help does this paper give us?

Mr. McElroy: I want to show Your Honor he referred to that and testified as to each of those items, and I want to show how little of that $560.00 was actually spent on entertainment. Most of that is business expense. I want to show how that $560.00 was actually spent by Southland.

[fol. 59] Mr. Vasiliades: We are not challenging whether this is a business expense to Southland; we are only concerned with whether it is income to Mr. Rudolph.

The Court: You are coming down to where the Court has to draw a conclusion here. For instance, take the round trip fare, $119.40. Now, the question is, was that $119.40 a part of the expenses for entertainment, was the trip for entertainment, was the meeting for entertainment, or was the meeting for a vacation and help as an agent, so I think after all it is a question of a conclusion.

I will admit it into evidence, but I don't see the materiality of it, since you are not suing for these items.

Mr. McElroy: Counsel is—

The Court: I have admitted it, so go ahead.

By Mr. McElroy:

Q. I hand you Plaintiff's Exhibit 14. I will ask you to tell us what this instrument is.

A. This is a copy of my letter to Dr. Norman Vincent Peale concerning the address he was to make to our group.

Q. Did you tell him the kind of talk you wanted him to make at this program?

A. Yes, I gave him the general background information and the type meeting, and made suggestions as to the theme I would like for him to speak on.

[fol. 60] Q. Did that letter suggest the purpose of the meeting you were hoping would be achieved in New York?

A. Yes, sir, it does.

Mr. McElroy: I offer in evidence Plaintiff's Exhibit 14.

By Mr. McElroy:

Q. Did you hear Dr. Norman Vincent Peale's address to that convention?

A. Yes, I did.

Q. Did he seem to tie in his remarks as best he could with the instruction given to him by that letter?

A. Yes, he did; he did a better job than I had hoped he would.

Q. What was the degree of attendance at that talk?

A. I would say every one there, there must have been 99 per cent. I am not aware of any absentees.

The Court: Is this the Dr. Peale whose name appears in the papers over the Nation?

The Witness: Yes.

The Court: Did he tell you anything about insurance, or did he talk about good morals and religion, and so forth?

The Witness: He talked about good morals and religion and tied that into how the well ordered life would contribute to success in any endeavor. He did mention something [fol. 61] specifically about the work of an insurance man. Apparently, he knew more about it than I did.

The Court: Go ahead.

By Mr. McElroy:

Q. Do you find the type of talk Dr. Peale gave helps to improve the morale of your agency force?

A. Yes, I think it boosts their morale in knowing that the company produced that type program and are interested in offering that type of information, and is also a great source of improving the morale and knowledge that an agent needs for successful work in selling.

The Court: I believe Dr. Peale has lectured more than once here in Dallas?

The Witness: Yes, sir, but I haven't heard him.

By Mr. McElroy:

Q. I hand you Plaintiff's Exhibit 15, and you will notice it is a letter addressed to "John Doe"; also a bulletin entitled "A New Partner Has Been Formed."

Will you tell us what that consists of?

A. This is a letter addressed to the wife of an agent, a new agent, as we make the contract with him. This letter is sent to his wife within a few days after the contract, enclosing this booklet explaining to her how she can help her husband in the life insurance business.

[fol. 62] Mr. McElroy: I offer it in evidence as Plaintiff's Exhibit 15.

By Mr. McElroy:

Q. Please tell us, as briefly as you can and yet in detail, how you as agency director for Southland attempt to integrate the wives' performance with the performance of agents in the life insurance business.

A. One of the important functions we have in mind is the attendance at these conventions. In addition to that communication, occasionally there are letters that will be written to the wife concerning any special sales effort that might be desired or promoted. The company has a monthly publication for the agents and employees that is mailed to their homes so the wife will have a convenient opportunity to see the magazine and read it.

At most of our convention program, we have some specific reference to the wife's work, and in quite a few of the convention programs—we have had wives appear on the program.

Q. Suppose you didn't have the wives and didn't seek to require their attendance at a convention, would there be some danger that your meetings and conventions would kind of degenerate into stag affairs, where the whole purpose of the meeting would be lost?

A. I think that would definitely be a tendency.

Q. Tell us whether or not in conducting this convention for Southland you believe, from your experience in industry, you are merely fitting this into the common industrial practice?

A. Yes, it is my impression that these conventions are held by most, if not all, other life insurance companies; therefore, it proves to be a very worthwhile and profitable endeavor for the company. We think it serves a worthwhile purpose for the Southland Life, is the reason we conduct them.

Q. As agency director, does that mean Mr. Rudolph is under your direction?

A. Yes.

Q. Suppose he didn't go to this convention, as an agency director, would you give him something else?

A. No, sir.

Q. Give him anything of value?

A. No, sir.

Q. Give him a trip or anything, if he might want to take it?

A. No.

Q. Any fringe benefit at all?

A. No, sir.

Q. As a matter of fact, rather than giving him something else if he didn't go, as agency supervisor and director, would you be displeased if he didn't have an adequate reason?

A. Yes, I would be. When an agent indicates, he is not going to be able to go I inquire as to the reasons why and explain to him he is expected to be there, and if he doesn't have a proper reason it would be looked upon with serious displeasure.

Q. Did Mr. Rudolph, or any other agent attending this convention, have any control of the convention?

A. No, sir.

Q. Did he have anything to do with controlling the program?

A. No, sir.

Q. On the hours?

A. No, sir.

Q. Or when he had to go some place or get up?

A. I suppose he would control when he got up, but he was expected to be there at the given times published in the program.

[fol. 64] Q. He didn't have any control over the business you put in the program?

A. No, he didn't.

Mr. McElroy: That is all.

Cross-examination.

By Mr. Vasiliades:

Q. How many agents did you have selling life insurance in 1956?

A. It would be approximately 800 in the total company.

Q. Approximately 800?

A. Yes.

Q. How many of those 800 attended this convention?

A. I believe it was approximately 125; according to this it was 102.

Q. About one-eighth?

The Court: Do you have agencies in all these cities where you hold meetings?

The Witness: Not always; no.

The Court: For instance, in Mexico; did you have one there?

The Witness: No.

[fol. 65] The Court: Or Havana?

The Witness: No.

By Mr. Vasiliades:

Q. You held a convention in Canada?

A. Yes.

Q. Do you sell insurance there?

A. No.

Q. In this job which you hold—you are vice president in charge of agencies, is that correct?

A. Yes.

Q. And as vice president in charge of agencies you

are familiar with all the company policies, as far as hiring and firing goes?

A. Yes, hiring and firing agents, yes.

Q. How about promotion of agents to executive positions?

A. If the promotion is within the agency division I am familiar with it, yes.

Q. But you are not familiar with the promotion to executive positions within the company?

A. No, not around what might be called executive positions in the agency or sales division.

Q. What would be the next step up for Mr. Rudolph as a promotion?

A. Due to the nature of the business it would be hard to say; any change in title would be a promotion for him, due to the nature of his present position.

Q. Would it have to be in an executive capacity?

A. That in itself would not necessarily be a promotion. There are other officers in the insurance company that do have titles, but as to the potential for income and [fol. 66] such as that, I couldn't say that they would necessarily be greater.

Q. Are agents considered potential executives?

A. Yes.

Q. Then do you, when you are surveying your agents, you look at each one of them and say, "Will he or will he not make a good executive?"

A. There are some occasions when I make that survey and decision, yes.

Q. And you have to be familiar with the performance of the agents in order to do this, do you not?

A. Yes.

Q. And you maintain, you or someone in the company, maintain records of the amount of insurance sold by each agent?

A. Yes.

Q. And that would play some part in determining whether or not he would qualify for a promotion or an increase in salary or executive position, would it not?

A. Yes, it would.

Q. And his conduct in the community in which he lives would be important also, would it not?

A. Yes, sir, very important.

Q. And you have to follow that in order to know what his conduct has been—in other words, you are interested to the degree that you maintain some tabs on that?

A. We are interested, of course, it may be difficult to determine, but we are interested in his conduct and reputation in his community.

Q. Most of the executives are here in Dallas?

A. Yes.

Q. And you, yourself, are here in Dallas?

A. Yes.

[fol. 67] Q. Now, did anyone call the roll, or count the noses at these meetings in New York?

A. No, other than to check who checked in the hotel.

Q. Does Mrs. Rudolph's name have a black mark beside it because she didn't go to the ladies' luncheon?

A. No.

Q. So far as you are concerned the Rudolphs stand just as high in your opinion as they did prior to their failure to go to this ladies' luncheon?

A. Yes.

The Court: I believe I might suggest to each of you that my view of the case is that if I allow the claim it will not be contingent on Mrs. Rudolph's going or not going. I am not going to split it up. Sometimes a Court might be inclined to split a case in the nature of a compromise, but I don't think this is a case of that type.

By Mr. Vasiliades:

Q. Tell me once more why New York City was chosen to hold this convention.

A. It was one of several cities that we were considering or had considered. There are a rather limited number of cities that we can hold our convention in that will meet the criteria we have. One of them is the hotel facilities and the housing in one group in one hotel, and that such hotel facilities be available at the approximate time we desire to have them, according to our schedule

Also, we select a place where the transportation is convenient for us, and also for any guest speakers we might [fol. 68] desire to have, and we select from a somewhat limited number of cities in the United States. We select some of those cities that are proven to be the more popular convention cities, or information from the convention bureau and our knowledge of conventions that have been held there, and New York City is certainly one such place, and for this convention meeting we decided on New York City as the locale for it.

The Court: We will now recess Court until 1:30.

(Whereupon, Court was recessed until 1:30 p.m. of the same day, at which time the following proceedings were had):

(Afternoon Session.)

Kenneth B. Skinner, produced as a witness on behalf of the plaintiff herein, having been previously sworn, resumed the stand and testified as follows:

Cross examination (Resumed).

By Mr. Vaseliades:

Q. Mr. Skinner, other than the convention in New York City, what other agents' conferences do you hold during the year?

A. We usually have several other meetings. We have a series of schools conducted in the home office that new agents under contract to the company attend. Each agency of the company holds one or two, sometimes three meet- [fol. 69] ings during the year of short duration for salesmen in that area. Occasionally, depending upon the need for it, we might have a conference out in the field between one or two agencies conducted by someone from the home office, or participated in by home office men.

Q. Are these fairly expensive to the company?

A. These that I mentioned, the latter—these local meetings?

Q. Yes.

A. No, we do not consider them very expensive.

Q. Who qualifies to attend those meetings?

A. Well, it would depend upon the nature of the meeting as to who we would tell to come into the meetings.

Some of the meetings might be on advanced phases of underwriting, possibly dealing with taxes and trusts, where we invite only those men showing aptitude for working in that type of endeavor; and some others might be on more elementary phases of the business where we have men fairly new in the business rather than having our older more experienced men in there which may be repetition for them.

Q. How do you evaluate the value of these meetings as compared with the meeting in New York City?

A. These local meetings are a necessary part of our activity, but in no way take the place of our general convention meeting.

Q. I realize there is not the entertainment and sightseeing and so on at these local meetings, but we are talking about educational value.

A. They have a definite educational value. They would not substitute for the general meeting, nor would the general meeting substitute for the specialized meetings.

[fol. 70] Q. Can you give us an approximate total of the cost of the convention in New York City?

A. Probably a rough estimate, I would assume in the neighborhood of 83 to $84,000.

The Court: $83,000?

The Witness: In that neighborhood.

Mr. Vasiliades: Can you give us an approximation of the amount expended on all other conferences for the agents?

A. No, I am afraid I could not give an approximation without doing some research in the books and records because of the nature of the accounting. It is not as easily identifiable.

Q. Did all of the individuals who qualified for the convention of 1956 attend?

A. To the best of my recollection all but about 10 or 15, in that neighborhood— 10 or 12. I have that record with me if you allow me to refer to it.

Q. These 10 or 12, did they obtain excuses from you for not attending?

A. Each of them, at the time, explained to me—I was aware at the time of the reason they were not attending.

Q. Are they blacklisted now as far as advancement goes?

A. I would not say they are necessarily blacklisted, as I recall—not recalling the reasons they did not attend—I recall they each had a valid reason for not attending.

[fol. 71] Mr. Vasiliades: No further questions.

Redirect examination.

By Mr. McElroy:

Q. Mr. Skinner, with regard to the basis of qualification of these various agents, I believe you previously testified there were possibly 800 agents, I want to ask you whether or not that 800 were ordinary life agents, or what kind of agents?

A. The figure of 800 was an approximate number of the total agents or salesmen representing Southland Life Company. Our agency division or sales force is divided into two separate organizations whose work are quite significantly different from each other.

The convention we had in New York with approximately 102 agents who attended were from our ordinary division, in which there are approximately—at that time, 300 agents that were eligible to be considered to attend this meeting of which about 102, or whatever it was, attended.

Q. So, one out of three of those eligible were ordinary life agents who attended?

A. That is correct. I might add, of the 102, while representing about one-third of the number of agents available, they produced or accounted for approximately three-fourths of the business written by the ordinary division.

Q. In addition to those who had the minimum business on the books to qualify to go, did you also have agents qualify on a pro rata basis?

A. Yes; men not with us for a long period of time. Some of those attended that produced $100,000 or less than $100,000, but we thought there was promise—they were men

[fol. 72] with a promising future and we wanted them to attend.

Q. When you allowed them to qualify to go and they became eligible to go to the convention, you were not giving them any prize or award because they had not done anything at that time?

A. That is true.

Q. Actually, they were able to attend with less production on the books than others that have been with the company?

A. Correct.

Q. Will you tell us whether you were choosing men on the basis of aptitude for the business?

A. Yes, we select the men to attend a convention based upon their proven abilities as well as men showing an aptitude for the business. The amount of business they have written in the past is an important yardstick in our judgment of measuring whether or not they are doing a good job and will continue to do one.

Q. In view of that picture, will you allow various agents in the company to attend who have minimal production records behind them? How would you characterize what this convention means to those men? What would it represent to the agents who have not—

Mr. Vaseliades: Your Honor, I object again. We are asking this witness once more to testify as to what a third party felt something was. We had the same situation with the wife; now we are asking him to testify what agents thought something was.

[fol. 73] The Court: I will let him testify how it affected his mind and how it apparently affected the agents. There is no jury here.

Mr. McElroy: Thank you, Your Honor. Go ahead, please.

The Witness: I looked upon it as a duty and responsibility to attend the convention of the agents as it is your duty and responsibility to cooperate and enter into any planned program the company plans for the benefit of the company and policy holders.

Q. In your opinion, the convention and related program and other events, while not income or—

The Court: I do not believe his opinion is admissible.
Mr. McElroy: All right, Your Honor.

Q. Let me ask you this; if you will tell us, please; why you regard it as important, if you do, to have these conventions away from Dallas?

A. In addition to the reasons I mentioned earlier about hotel facilities being adequate, transportation being convenient and the availability of speakers outside of the company, in addition to that, it is considered by us important that the convention be held at a location away from the agencies and home office—the officials' place of business—so they are not spending their time attending to business [fol. 74] instead of convention business; that they will be away from outside distractions of their own business and responsibilities such as that.

Q. This final question: If, considering the convention as a whole, you had to give up the formal parts of it relating to the business program, or the informal parts where you have provided occasions for every man to meet and talk occasionally about their own problems and ideas, which would you give up?

A. I think they are both important but I believe the most important is the opportunity for an informal visit and exchange of ideas that take place at times other than the formal business program—the opportunity to become better acquainted with fellow agents in other parts of the nation and have a discussion of individual problems. I think that is as important or more important than what they receive in the way of formal speeches from the platform.

Mr. McElroy: That is all we have.

Recross examination.

By Mr. Vaseliades:

Q. Why was the 1959 convention held in Dallas?

A. Because in connection with the opening of the home office building, we wanted the sales force to have an opportunity of becoming acquainted with the building.

Q. How about the people who joined your sales force

after 1959, wouldn't it be appropriate to hold a convention in Dallas every year?

[fol. 75] A. We do not consider it so. Those that join the company after 1959, will, on some occasion, will be coming to the home office of a school or a small specialized conference.

Q. In other words, they can get everything you want them to get in Dallas if you choose to give it to them there, can they not?

A. No, sir, I do not think so.

Q. They have to run off to the Waldorf Astoria in New York to get it?

Q. Not necessarily New York City.

Q. But it is impossible to get it in Dallas?

A. We think we can accomplish much more held in a location—most conventions are held in a location other than Dallas. We think we can accomplish much more and get a better job of getting our messages over to the agents and messages back from them away from their place of business.

Q. These agents who have been with the company for a short time and qualify by selling less than other agents, the appropriation was the same, was it not, Mr. Skinner?

A. The rate of production for the period of time they had been here—or were producing at the same rate as were the others production per month, or something like that, if that is what you refer to?

Q. Yes.

A. Yes, it is the same or similar; I don't recall if it is the same.

Mr. Vaseliades: No further questions.

Mr. McElroy: No further questions.

[fol. 76] The Court: You may be excused.

(Witness excused.)

J. Harry Wood, produced as a witness on behalf of the plaintiff herein, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McElroy:

Q. Will you state your name?
A. J. Harry Wood.
Q. Where do you live?
A. Hartford, Connecticut.
Q. Where were you born?
A. I was born in Arkansas.
Q. How long did you live there?
A. Until I finished college.
Q. Where did you go to college?
A. Harvard.
Q. Did you take an M.A. degree somewhere?
A. Columbia.
Q. Then, did you go to work for a life insurance company?
A. I went to work in between that.
Q. Which one?
A. John Hancock of Boston.
Q. Did you have various positions with that company?
A. Yes, sir.
Q. When did you first become interested in life insurance agency management?
[fol. 77] A. You mean the organization or the job of management?
Q. The job of management.
A. In 1930.
Q. Will you tell us of your connection, please, with the Life Insurance Agency Management Association—when it began and your present position?
A. Two years ago.
Q. What is your position?
A. Managing Director.
Q. What does your agency seek to do?
A. We have four functions: Research, Management Consultation, Education and Training, and Publications. We have 125 people, half of them doing research.
Q. Before continuing, I want to ask you if you also worked for the Paul Revere Insurance Company.

A. Yes.

Q. What was your capacity?

A. Executive Vice President, operating head.

Q. When was hat?

A. '44, '49.

Q. Have you also worked for and had a position of executive responsibility for the Central Standard Life Insurance Company?

A. Yes, sir, President.

Q. Where was that located?

A. Chicago, Illinois.

Q. Have you been a professor in the insurance field?

A. Not in the insurance field.

Q. In the management field?

A. Yes.

Q. Where was that?

A. Washington University, St. Louis.

Q. When was that?

[fol. 78] A. '51 to '55.

Q. Have you also served as editor of C.L.U. Journal?

A. Yes.

Q. What is the C.L.U. Journal?

A. It is the one professional publication in the life insurance business.

Q. With regard to your present duties, may I ask you whether or not annual meetings, or regular meetings of perhaps every 18 months or some similar period of time, are such meetings as those of a common and frequent occurrence within the life insurance industry, generally?

A. I could say practically universal. There may be exceptions, if there are, I am not aware of them, and have been going on for many, many years.

I noticed a publication that we put out in the first two years of our organization's history, which would be in '24, on conventions, covering the necessity why they were held and so on. So, even at that time, they were important enough and traditional enough and a part of the business enough to warrant one of the early reports—I should say publications about the business.

Q. Is it traditional in the life insurance agency to hold this type of convention as part of the agency development program of the company?

A. Yes; too. I say it is more than that but companies usually think of holding them to educate—but I mean education in a little bit different way than normal, to motivate, to build loyalty; but to my mind, one of the chief reasons for a general convention is to rekindle and reeducate the man to the life insurance business because this is sort of a lonely business in the sense you probably get more turn-downs to [fol. 79] sales than in many others, and so, when agents meet other successful agents from over the country and find out they have the same problems, I think much is accomplished by that meeting.

Q. Is anything accomplished toward acquiring and maintaining loyalty to the company at the convention?

A. Yes, it is, but the loyalty comes about from two or three ways. First you form a loyalty by learning and knowing the company is strong and the company is strong in part by reaction toward management; and, secondly, because your loyalty to any organization is partly loyalty to individuals and as you get to meet individuals of that company from all over the country, that builds a friendship which in turn makes for loyalty.

Mr. Vaseliades: Your Honor, might I inquire of the witness if he was present at this 1956 convention held by Southland?

The Witness: I was not, sir.

Mr. Vaseliades: We will have to object to all this testimony as being irrelevant to our particular case, as everyone knows each convention is different.

The Court: I think, counsel, he might be permitted to tell the general purpose of the company in holding these conventions, but I don't think he is naturally qualified to tell what happened at this convention.

[fol. 80] Mr. Vaseliades: May I ask him then if he is aware of the purpose for which Southland held this convention.

The Witness: I have heard this morning and would know why any and all companies do hold them. I think I could tell you that about any company that you would name—their purpose, if I never heard of it.

Mr. Vaseliades: This is your conjecture.

The Witness: Well, based on 33 years of study and observation and full time work in management and consultation in the insurance business today and trying to save them money.

Mr. McElroy: As an expert in this field, I believe you qualified yourself as an expert, tell us whether or not these conventions in the industry generally are held for legitimate business purposes of the company holding them.

Mr. Vasiliades: I object for the same reason. Each convention is different. How can this witness say a convention is held for a certain purpose without having been there?

The Court: I believe, counsel, it might be well to let him state the advantages that accrue to the company by reason [fol. 81] of the holding of them and leave the conclusion to the Court.

Mr. McElroy: Thank you.

Mr. Vasiliades: One further reason for my objection is, as I stated before, we are not challenging the bona fides of this production to the insurance company; that is not an issue and any evidence on that matter is irrelevant to our issue. That is all he has given us here today.

Mr. McElroy: Please go ahead.

The Witness: You may be correct, sir.

Mr. McElroy: Do not direct yourself to counsel; just His Honor. Tell His Honor the advantages to the company for holding conventions of this type.

A. There are many; for instance, one reason is for the purpose of education. By "purpose of education" I don't mean that which they naturally can read in a magazine because reading is not enough. One of the things, the companies attempt to educate their field force toward the right kind of business and why that business would remain in force long after it gains monetarily—they are discussing that. They are also discussing such things as trying to keep up with the interests of the agents, and the company and the public generally. That is what I call the field of education.

[fol. 82] The Court: Breaking down the thought, what are the elements? What are the things that would be of educa-

tional value to be received from a meeting held at a distance over and above a meeting held, let us say, at home?

A. I agree completely and practice this as an operating executive so I am not just talking now and I say that you must get your people occasionally away from their headquarters for two reasons. One reason that has been given just previously, that if they are at their headquarters, like the home office, they are going to spend time on things other than what the company is trying to get over at the general meeting. The real reason for taking it some place else, furthermore, I mean, you have got to have some place which is a central location, if it is going to be some other location. Then you get them all there and you have a cross fertilization of ideas, not only between agents in Dallas and Houston, but agents in Dallas, Arkansas and wherever they may be—it is that cross fertilization of ideas and sometimes the farther away you are, the more the impression.

The Court: Take a small place with hotel facilities; take Mineral Wells, Texas; would there be anything to detract from your having conventions there?

A. If I lived in New York or Chicago, I think I would like to go to Texas, but, I am not in Chicago, I am in Texas. However, this train trip means the people are thrown together from the standpoint of building loyalty and there is where you exchange so many of your business ideas. I think to a certain extent distance in itself is an added advantage.

[fol. 83] The Court: Will this case serve as a class suit? In other words, will other men who attended this convention have suits of this character?

A. That is one thing I am wondering about. One reason I am glad to be here is because this will—if this kind of suit was decided against the plaintiff, it could change the whole operation of the insurance business. This is not just a suit, as I see it, of one case. Here is a type of sale procedure, sales management which has been a part of the business for a number of years; certainly for more than 35 or 40

years, in which motivation, stimulation and training all revolves, and so every company in the country, if they knew about this, and every agent in the country would be tremendously interested. It goes far beyond and that is why I am interested because it is really hitting at the established roots of agency management.

The Court: Of course, there are a number of suits the same nature of this one that adds to the importance of what we are about to do.

The Witness: Right, sir.

Mr. McElroy: Can you tell us this, Mr. Wood, based on your experience over the years in the life insurance industry generally, whether or not the purpose of these conventions in promoting and motivating the skills and attitudes of the agents is any way detracted from by having sightseeing tours and entertainment in conjunction with the convention?

[fol. 84] A. No, sir. I attended a convention recently and if they had not had a tour in the afternoon, I would have been ready to jump out of the window. I think you know that salesmen are out walking and you can't keep the salesmen in their chairs all the time.

Q. Have you found the presence of an agent's wife at a convention does serve or does not serve bona fide business purposes?

A. I think it serves bona fide business purposes for a lot of reasons. I thought about this bona fide business purpose last night. For one thing, in the life insurance business an agent's wife comes as close as being a partner as in any other kind of business. I know one thing and that is it is encouraging for the agent's wife to help in prospecting and help the agent and so help build morale of the agent and they learn about this at the convention. Another thing they learn—there are some wives who wonder why their husbands don't come home to dinner or are out late at night and they come to the convention and find out that all agents practically have that problem. All the agents' wives have the problem of dinner getting cold, social engagements being broken and it gives them the understand-

ing and conviction that this company is for their husband and that builds something.

Furthermore, agents' incomes fluctuate; they make a good sale and then don't make any and the wife is given the background and knowledge to understand that—given the background to understand the importance of budgeting.

It tends to give them a feeling of security—a feeling that their husband is in a secure career, where otherwise they may have wondered about that because he is on commission and may be working out of his home. Previously, he may [fol. 85] have been working for a bank or other firm as a salaried employee, and it seems to me they are motivated to learn more about the business.

Most conventions I know anything about, the wives attend the business sessions and they listen and so that can't help but have a bona fide business purpose; and this may be an individual thought, but it seems to me conventions serve another bona fide purpose as far as wives are concerned, and it is this; they begin to see other agents send their children to college; other agents own their homes and have those things and it gives them a lift toward wanting more of the things others have and thus encourages them to believe their husband is in a business where he can give it to them.

Mr. McElroy: Thank you; we have no further questions.

Cross examination.

By Mr. Vaseliades:

Q. You said you are an employee of the Life Insurance Management Association; what is that?

A. The Life Insurance Management Association is a nonprofit organization doing research and management consultation work.

Q. Are the headquarters in Washington?

A. Hartford, Connecticut.

Q. Where is your office?

A. Hartford, Connecticut.

Q. Is this management association paying for your expenses to come down and testify here?

A. They are not.

Q. Who is?

[fol. 86] A. As a matter of fact, I happened to be in Denver and when I was asked to come, I said I would but would like to have my extra expenses paid by the people who asked me to come and there was no disagreement.

Q. Who is paying your expenses?

A. Southland Life.

Q. Thank you. You say the reason for holding this convention away from the home office is to have everybody together where you can watch them and observe them—is that part of it?

A. No, the reason to have it away from the home office was they would not during the day be running into their offices to attend to business they could handle by mail. To keep them together for the purpose for which we had them, which is partly for business meetings, but a great deal for their cross fertilization with one another from other parts of the country.

Q. Wouldn't it be better to hold this convention in a secluded spot where they could not conduct their business?

A. Some are held at secluded spots.

Q. You would not consider New York City or Mexico City a secluded spot?

A. I would consider it a spot away from the home office.

Q. But there are numerous distractions in those cities.

A. Let's say there are numerous entertainments as there are in secluded spots.

Q. What do the agents get out of this trip?

A. Well, I think they get a tremendous amount. For instance, this is one business in which I am now speaking from experience.

[fol. 87] Q. That is why I asked.

A. This is one business where you are drained dry from your own work by turndowns in comparison with number of sales and so, going to this kind of general meeting among other successful people and finding out they have had exactly the same problems and that they have felt frustrated and lost gives you renewed courage.

Q. These are all the same people you can meet at regional meetings?

A. No, sir.

Q. Why not?

A. Because you only had a portion of your company. If you went one time to one regional and another time to another regional, that might in time be so, but that is not the way it is done.

Q. The agent receives a free trip to New York City, also; you did not mention that.

A. I would hope his expenses would be paid because he is on commission and loses earnings through that.

Q. Even in a nightclub—the Copacabana?

A. I would say that would be as good a place.

Q. To discuss insurance business?

A. Oh, no, but I understood this was dinner time and after.

Q. But during the luncheons you dispose of the business—not at night?

A. As a matter of fact, I just came from a convention and after dinner, they were talking business part of the time at every table.

Mr. Vaseliades: No further questions.

[fol. 88] Mr. McElroy: No further questions. May this witness be excused?

The Court: He may go.

(Witness excused.)

JOHN L. BRIGGS, produced as a witness on behalf of the plaintiff herein, having been first duly sworn, testified as follows:

Direct examination.

By Mr. McElroy:

Q. State your name.

A. John L. Briggs.

Q. Where do you live?

A. 4577 Bordeaux, Dallas.

Q. How long have you lived in Dallas, approximately?

A. Forty years.

Q. By whom are you employed?

A. Southland Life Insurance Company.

Q. How long have you been so employed?

A. It will soon be thirty-four years.

Q. What is your position with Southland?

A. Vice President and Director of Public Relations.

Q. In connection with the discharge of your duties as Vice President and Director of Public Relations for Southland, did you have occasion to work on some of the details of the 1956 convention in New York City?

A. I did.

[fol. 89] Q. Did you have to make a determination of your own as to the reasonableness of the various monies that Southland was paying out in connection with the convention?

A. I did.

Q. For example, did you check the reasonableness of transportation to New York City by railroad?

A. Yes.

Q. Explain that to us briefly.

Mr. Vasiliades: None of this has any issue, Your Honor. The price of this trip has even been stipulated to. I see no need to once again go over this material.

The Court: Try to avoid anything in the record undisputed.

Mr. McElroy: All right, Your Honor.

Q. With respect to the dinner at the Copacabana, did you make a determination of prices of other eating places in New York City where a crowd of this size might have dinner?

A. I did.

Q. Did you determine where you decided to have it, would cost more or less, than having it at any other place?

A. It certainly was not as much as many places. It was a very reasonable average figure in my opinion.

Q. For a hotel with convention facilities that the Waldorf had, did you find by comparison with other hotels that their rates were reasonable or not reasonable?

[fol. 90] A. They were reasonable.

Q. With respect to the various tours and other items

for this convention program, did you undertake to do this in the most reasonable and expedient way you could?

A. Yes, sir.

Q. Taking the agent's position whereby the selling of life insurance is to him a business, tell us from your experience with Southland Life whether or not attending a convention would be considered part of an agent's duty to his company?

Mr. Vasiliades: Your Honor, I would like to hear once a question that could be answered without yes or no. I can't recall a single one so far.

The Court: He is running this case.

Mr. McElroy: Mr. Briggs, if you will, tell us whether or not attending conventions would normally be part of an agent's duty to his company?

A. I believe that it would; yes, sir.

Q. Was there anything about the tours and the entertainment that you, yourself, planned and observed in New York City that would or did detract from the purpose of the meeting and promoting professional skills and morals of those agents?

A. No, sir.

Mr. McElroy: That is all we have, Your Honor.

[fol. 91] Mr. Vasiliades: No questions.

(Witness excused.)

Mr. McElroy: Plaintiff rests, Your Honor.

And, Thereupon, the defendant, to maintain the issues on its part, introduced the following evidence, to-wit:

Mr. Vasiliades: I want to call Mrs. Rudolph.

The Court: Counsel for each side should bear in mind what we have said here. It will be unnecessary to go into any special phase of the case that would bear on the benefits that she received. I think it might be shown that her presence made her husband a better delegate, or whatever it is; that is a matter of opinion.

Mr. McElroy: May we state to the Court, Mrs. Rudolph has been very nervous for some time because of trouble she has in her ear and her health has not been excellent.

The Court: I think we should take cognizance of that and not be rigid on cross examination, as it were.

[fol. 92] Mrs. C. J. D. Rudolph, produced as a witness on behalf of the defendant herein, having been first duly sworn, testified as follows:

By Mr. Vaseliades:

Q. Mrs. Rudolph, you are a housewife, I believe, is that correct?

A. That's right.

Q. That takes up a considerable amount of your time?

A. That's right.

Q. You engage in church and civic activities?

A. I do.

Q. That requires a considerable amount of time?

A. Yes.

Q. Do you have any grandchildren?

A. Yes.

Q. How many?

A. One.

Q. You have always been interested in your husband's work, have you not?

A. Yes.

Q. There is nothing that you do for your husband that you would not do anyway as a dutiful wife, is that correct?

A. That's right.

Q. Independent of whether or not you went to a convention, you felt it was your duty as a dutiful wife, you would perform or attend any function he asked you to?

A. Yes.

Mr. Vaseliades: I have no further questions.

[fol. 93] Mr. McElroy: Did you find that your attendance at these conventions has enabled you better to work with your husband in the performance of his duties?

A. Definitely.

Mr. Vaseliades: Just one more question. Do you recall approximately how many conventions you had attended before the 1956 convention?

A. Well, I have attended all except two because my husband has been with the company—I can't recall how many.

Mr. Vasiliades: Will you tell me what you learned in the 1956 convention that you did not already know?

A. Not right now I couldn't; I would have to think.

Mr. Vasiliades: No further questions.
Mr. McElroy: Thank you; that is all, Your Honor.

(Witness excused.)

Mr. Vasiliades: Defense rests, Your Honor.

Defendant Rests.

Mr. McElroy: Plaintiff closes, Your Honor.

[fol. 94]

In United States District Court

Note Re Argument

The Court: Gentlemen, I would like each of you to give a little summary of the evidence as you understand it and then your deductions or your conclusions as to why plaintiff should or should not recover.

Whereupon Mr. McElroy presented his argument after which Mr. Vasiliades presented his argument.

Which was all of the evidence offered or received and arguments of counsel on the trial of this case.

In United States District Court

Oral Memorandum of Court

The Court: Gentlemen, you have an interesting question here, although as far as this case is concerned, it is only a small sum.

There are certain well settled propositions of law we might gather our thoughts and reasons from. One is that a bonus paid to an employe is part of his income, just like a tip paid to a waitress is part of her income. So much for that.

It is likewise a well settled proposition of law that an employer may assemble his employes for the purpose of training and instructing them, and the expenses that he goes to or to reimburse them for the expense they went to in coming to the meeting is a legitimate expense of the company, and no gain to the employe in a monetary way.

Now the reasoning from these two propositions—let us see what is true here.

The Alabama case was for attending a convention at Fort Monroe in Virginia. It does not appear where the office of the company is—the insurance company—it does not appear where the territory of the company is. So far as the information is concerned, much of its business might be [fol. 95] around and about Fort Monroe. Therefore, selection of that place would be in line with ordinary business economy.

We will assume that the company here has a larger part of its business in Texas and adjoining states. Primarily, the place of the home office would be the place where the agents would be called to as a business proposition to receive instructions and to be taught.

Suppose there was a lot of business down and around San Antonio. To break the monotony to a degree, the convention might be held in San Antonio, or in Houston, or might be held in Oklahoma City. But what business reason is there for holding a convention in a place as far away as New York; and certainly, what business reason is there for holding a convention in Havana, Cuba. I am sure you did not write Fidel Castro for permission. It was not held down there for educational purposes, nor was the trip to the City of Mexico for educational purposes in insurance.

Assume that it was to a degree; what was the primary purpose of the trip? It was a reward, or a bonus given to the employes for excellence in service. If it was purely educational, it might be held here in Dallas and those who did not attain such a high rating might have the benefit of the program at the convention.

All of the evidence considered, we think it irrefutably leads to this conclusion: That the insurance company was just doing a gracious, magnanimous thing of giving those leading agents a trip just as much as if it had given them

an automobile, or suit of clothes—the trip to New York, but the trip to New York cost them $80,000.

The Court's conclusion is that the holding of these conventions and especially the holding of them at remote places, [fol. 96] that the primary purpose was that of affording a pleasure trip which the agent himself, to have enjoyed, would have paid out of his own funds if the company had not given it to him, which is in every way in the nature of a reward that would be a bonus.

Suppose they had offered it to a man in this manner: At the first of a given period, let's say the first of the year, to all those that write over $100,000 insurance, let's say, we will either give you a free trip to Paris, France, or we will give you a bonus of $500. You can exercise your choice; either one would have been a bonus. The trip would have been a bonus. The primary purpose of it was not to educate insurance men in Paris; the primary purpose of it was to hold out an alluring reward to make them work harder. It was part of their service.

We will award judgment to the defendant in the case.

IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed September 21, 1960

This is an action by the plaintiffs to recover $126.90 in income taxes and $10.19 of interest, together with interest on such sum. Plaintiffs were assessed and paid such amount and bring this suit to recover the payment so made.

The deficiency in such amount was assessed on the theory that the $560.00 admitted value of an all expense paid trip from Dallas, Texas to New York City, taken by the plain- [fol. 97] tiffs, husband and wife, in 1956, and paid for by the Southland Life Insurance Company, was includible in the income of the plaintiffs, and as a personal expense was not deductible by them as an ordinary and necessary business expense. Plaintiffs contend that the value of such trip was not income to them, and even if it were, that they are entitled to deduct its value as an ordinary and necessary business expense. Plaintiff, C. J. D. Rudolph is an insurance agent selling for Southland. He qualified to attend South-

land's convention in New York City and also to take his wife along by virtue of selling the requisite amount of insurance as determined by Southland. The convention trip consumed five or six days. Of this time, one morning session was devoted to a business meeting, followed by a business luncheon. The remaining time was devoted to travel, sightseeing, entertainment, fellowship or free time.

There are certain well settled propositions of law we might gather our thoughts and reasons from. One is that a bonus paid to an employee is part of his income, just like a tip paid to a waitress is part of her income.

It is likewise a well settled proposition of law that an employer may assemble his employees for the purpose of training and instructing them, and the expenses that he goes to or to reimburse them for the expense they went to in coming to the meeting is a legitimate expense of the company, and no gain to the employee in a monetary way.

Now the reasoning from these two propositions—let us see what is true here.

The recent Alabama case, Thomas v. Patterson, a November 1959 decision of the United States District Court for the Northern District of Alabama, was for attending a [fol. 98] convention at Fort Monroe in Virginia. It does not appear where the office of the company is—the insurance company—it does not appear where the territory of the company is. So far as the information is concerned, much of its business might be around and about Fort Monroe. Therefore, selection of that place would be in line with ordinary business economy. In any event, we are concerned with whether plaintiffs in this case must include the value of the trip in their income and if so, whether or not they are entitled to a business expense deduction. We are not concerned with the deductibility of the convention's cost by the insurance company. It is the purpose of the convention to the taxpayers which governs our action, not the purpose of the insurance company in holding them.

We will assume that the company here has a larger part of its business in Texas and adjoining states. Primarily, the place of the home office would be the place where the

agents would be called to as a business proposition to receive instructions and to be taught.

Suppose there was a lot of business down and around San Antonio. To break the monotony to a degree, the convention might be held in San Antonio, or in Houston, or might be held in Oklahoma City. But what business reason is there for holding a convention in a place as far away as New York; and certainly, what business reason is there for holding a convention in Havana, Cuba. It was not held down there for educational purposes in insurance.

Assume that it was to a degree; what was the primary purpose of the trip? It was a reward, or a bonus given to the employees for excellence in service. If it was purely [fol. 99] educational, it might be held here in Dallas and those who did not attain such a high rating might have the benefit of the program at the convention.

All of the evidence considered, we think it irrefutably leads to this conclusion: That the insurance company was just doing a gracious, magnanimous thing of awarding those leading agents a trip just as much as if it had awarded them an automobile, or suit of clothes, similarly the plaintiff and the other leading agents of Southland were awarded this trip to New York, and the trip to New York cost Southland $80,000.

The Court's conclusion is that the holding of these conventions generally, and especially the holding of them at remote places, have the primary purpose of affording a pleasure trip which the agent himself, to enjoy, would have paid out of his own funds if the company had not given it to him, which is in every way in the nature of a reward that would be a bonus.

Suppose they had offered it to a man in this manner: At the first of a given period, let's say the first of the year, to all those that write over $100,000 insurance, let's say, we will either give you a free trip to Paris, France, or we will give you a bonus of $500. You can exercise your choice; either one would have been a bonus. The trip would have been a bonus. The primary purpose of it was not to educate insurance men in Paris; the primary purpose of it was to hold out an alluring reward to make them work harder. It was part of their service.

Therefore, we conclude, that the trip was earned by the plaintiff, C. J. D. Rudolph, and was in the nature of a bonus, reward, and compensation for a job well done. As compensation, the $560.00 value of the trip of the husband [fol. 100] and wife was properly included in the income of plaintiffs for the year 1956.

Further, since the trip was primarily a pleasure trip in the nature of a vacation, its cost is personal to the husband and wife and therefore not deductible by them.

Recovery for the plaintiffs will be denied for the reasons above stated.

T. Whitfield Davidson, United States District Judge.

In the United States District Court

For the Northern District of Texas,

Dallas Division

Civil No. 8317

C. J. D. Rudolph and Irma M. Rudolph, Plaintiffs,

vs.

United States of America, Defendant.

Judgment—Filed September 29, 1960

The above entitled case came on for trial by the Court without the intervention of a jury. The Court, having heard the evidence and arguments of counsel, rendered its opinion in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

In conformity therewith, it is hereby

Ordered, Adjudged, and Decreed that the plaintiffs' complaint be and is hereby dismissed with prejudice and with costs taxed to the plaintiffs.

[fol. 101] Done, this 28 day of September, 1960.

T. Whitfield Davidson, United States District Judge.

Approved as to Form:

B. T. McElroy, Attorney for Plaintiffs, W. E. Smith, Attorney for Defendant.

In the United States District Court

For the Northern District of Texas,

Dallas Division

Civil No. 8317

C. J. D. Rudolph and Irma M. Rudolph, Plaintiffs,

vs.

United States of America, Defendant.

Notice of Appeal—Filed November 15, 1960

C. J. D. Rudolph and Irma M. Rudolph, husband and wife, Plaintiffs herein, proceeding under Rule 73 of the Federal Rules of Civil Procedure, hereby file their Notice of Appeal, taking their appeal from the Judgment rendered herein on the 29th day of September, 1960, to the United States Court of Appeals for the Fifth Judicial District sitting at New Orleans, Louisiana.

Turner, White, Atwood, McLane and Francis, By [fol. 102] B. T. McElroy, Attorneys for C. J. D. Rudolph and Irma M. Rudolph, 1900 Mercantile Dallas Building, Dallas 1, Texas.

Cost Bond;

Statement of Points;

Order to Forward Exhibits in their Original Form, or Photostatic copies to U.S.C.A., for Inspection by such Court;

Appellant's Designation of Exhibits to be sent in their Original Form;

Appellant's Designation of Contents of Record on Appeal;

Appellee's Designation of Contents of Record on Appeal;

Omitted from the Printed Record pursuant to Designation as to Printing Record heretofore copied at page 1.

* * * * * * *

[fol. 103] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 104]

PLAINTIFFS' EXHIBIT 10

Company-Arranged:

December 11—Two convention special trains leave Dallas at 9:30 p.m.

December 13—Sightseeing Trip to Waldorf-Astoria.

Arrive Jersey City, N. J., at approximately 3:00 p.m. and board the special buses parked alongside the trains. Buses cross lower New York Bay via ferry boat, affording an excellent view of the Statue of Liberty, the New York skyline and other landmarks. Arrive at the hotel's 49th Street entrance about 4:00 p.m.

December 14—Business Session.

9:30 a.m. to 12:00 noon—Empire Room of the hotel. See page 23 for detailed program.

*Group Luncheon.

12:30 p.m. in the hotel's Sert Room (so named in honor of the famous artist who painted the murals in the room).

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* Coupons furnished for these events must be surrendered when called for.

*Sightseeing Tour.

2:30 p.m. sightseeing buses leave the 49th Street entrance. The buses pass Rockefeller Center; skirt Central Park for its full 2-1/2-mile length; penetrate into Uptown Manhattan as far north as Grant's Tomb; swing south to pass the Cathedral of St. John the Divine and bisect Central Park; reach Fifth Avenue and travel the renowned [fol. 105] thoroughfare for a distance of 92 blocks through Midtown Manhattan and into Downtown Manhattan past Chinatown, the Bowery, Battery Park, then north again past Brooklyn, Manhattan and Williamsburg Bridges; and follow the East River past the United Nations Headquarters, finally returning to the Waldorf-Astoria about 5:30 p.m.

December 15—*Breakfast and Fashion Show (for Ladies Only).

8:45 a.m. ladies only board buses at the 49th Street entrance for transportation to the breakfast and fashion show scheduled in the Charleston Garden Restaurant at B. Altman & Company on Fifth Avenue. The function will be over by 10:45 a.m. (in time for those who wish to do so to attend the special Christmas show at Radio City Music Hall—1:15 p.m.). The ladies will arrange their own transportation for returning to the hotel or going to whatever spot is next on their agenda.

Convention Events:

Special Christmas Show at Radio City Music Hall.

1:15 p.m. curtain goes up. Actual tickets are needed for this event.

Such tickets are available on Two Occasions Only:—

[fol. 106] (1) Any time up to 6:00 p.m. Thursday, December 13, at Southland Life's special registration desk in the South Lounge; and

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*Coupons furnished for these events must be surrendered when called for.

(2) Between 12:00 noon and 12:30 p.m. Friday, December 14 (prior to the start of the group luncheon), at the Sert Room.

*Evening at Copacabana.

6:30 p.m. buses leave the 49th Street entrance for the Copacabana where there will be dinner, dancing and floor show. Buses for return to the hotel will load at 10:00 p.m. at the Copacabana entrance. Formal dress is Not called for.

Any Date While in New York.

Each convention kit contains coupons for the following activities which may be elected at your convenience:

*Tour of the Empire State Building (about one hour).

*Tour of Rockefeller Center (about one hour).

*National Broadcasting Company Behind the Scenes Tour of radio and television studios in Rockefeller Center (about one hour).

Radio and Television Shows.

Actual tickets are needed for attending live radio and television shows. A limited number of tickets for certain of these radio and television shows has been obtained. Such tickets are available on Two Occasions Only:

[fol. 107] (1) Any time up to 6:00 p.m. Thursday, December 13, at Southland Life's special registration desk in the South Lounge; and

(2) Between 12:00 noon and 12:30 p.m. Friday, December 14 (prior to the start of the group luncheon), at the Sert Room.

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* Coupons furnished for these events must be surrendered when called for.

December 16—Buses leave the 49th Street entrance for return to trains.

10:45 a.m. the first bus leaves; the last departs at 11:45 a.m.

[fol. 108]

PLAINTIFFS' EXHIBIT 11

Business Meeting.

1956 Agency Convention—Waldorf-Astoria Hotel.
New York City, New York.

Presiding—Kenneth B. Skinner, CLU.
Vice President and Agency Director

Friday Morning

December 14

9:30 a.m.—Door Prizes.

Invocation . . . Neil H. Wright, Lubbock, Texas.

"Welcome to New York" . . Ben H. Carpenter, Executive Vice President.

Agents' Panel—Theme: "Success Through Planning."

Herman Ford, CLU, Moderator. Asst. Vice President and Director of Sales Training.

Huff Baines, Austin, Texas.

Sully Woodland, San Antonio, Texas

Jimmie Whitmire, Wichita Falls, Texas.

Johnny Wright, Tyler, Texas.

Recess.

[fol. 109] "The 1957 Agency Activity Program" . . . Glenn M. Brooks, Vice President and Director of A & H Insurance.

"Our Southland Life Future" . . . Dan C. Williams, President.

"Your Company and Mine" . . . John W. Carpenter, Chairman of the Board.

Adjourn.

12:30 p.m.—Luncheon—Sert Room, Waldorf-Astoria Hotel.

Presiding—Field Scovell, Vice President and Superintendent of Ordinary Agencies.

"Success Through Right Thinking" . . . . Dr. Norman Vincent Peale.

PLAINTIFFS' EXHIBIT 12

Dallas, Texas

August 19, 1960

Kenneth B. Skinner
Andy Edmonson

Classification of People Attending the New York Convention in December, 1956

Dear Ken:

The classification breakdown on the 293 Southland people who attended the New York convention in 1956 was as follows:

	MEN	WIVES
Agents	102	97
Salaried Field Assistants	3	3
Assistant Managers	2	2
Managers	17	17
Officers and Home Office Men	27	23
TOTALS	151	+ 142 =293 people

These figures have been confirmed by my final New York convention trip roster.

Sincerely,

/s/ ANDY G. EDMONSON
Agency Secretary

AGE:pw

PLAINTIFFS' EXHIBIT 13

Dallas, Texas

August 18, 1960

Kenneth B. Skinner
Andy Edmonson
New York Convention Expense, 1956

Dear Ken:

Following are the various items of expense in connection with the New York Convention. To determine the [fol. 110] average cost per person, the total expenditure for each item was divided by the number of people covered by such expenditure. The average cost per couple was calculated as two times the average cost per person.

Description of Expense	Average Cost per Person	Average Cost per Couple
Allowance for meals in New York		
3 breakfasts (@ $2.00		
1 lunch $3.00		
2 dinners (@ $5.00	$ 19.00	$ 38.00
Round Trip Train Fare		
Dallas to New York City	119.40	238.80
Pullman Cost	37.13	74.26
Rail Meals	30.54	61.08
Baggage, Porter & Dining car tips	8.23	16.46
Hotel Room at Waldorf	36.33	72.66
Ticket to Radio City Music Hall	2.50	5.00
Sightseeing Bus tour in N. Y. City	2.75	5.50
Dinner at Copacabanna Night Club	9.20	18.40
Transportation to and from Copacabanna	.82	1.64
Luncheon at Waldorf Hotel	6.00	12.00
Totals	$ 271.90	$ 543.80

Sincerely yours,

ANDY G. EDMONSON,
Agency Secretary.

AGE:mp

P. S. Total expense allowance checks	$ 7,686.96
N. Y. meals included in above (19.00 per person)	5,567.00
Congregation expense	$ 2,119.96

Congregation expense, $2,119.96 + 293 = 7.24 × 2 = $14.48

[fol. 111] PLAINTIFFS' EXHIBIT 14

November 9, 1956.

Dr. Norman Vincent Peale
Marble Collegiate Church
Fifth Avenue at 29th Street, West
New York 1, New York

Dear Dr. Peale:

We are most pleased to hear from D.R. LeSourd that you will be able to speak to the luncheon meeting of our Company at the Waldorf-Astoria on December 14th. Dr. LeSourd felt you would be interested in a little further information concerning our group of people that will be in attendance.

This group will number approximately 350 people, composed principally of agents and wives. Also present will be our Agency Managers, Home Office officials and their wives. Most of the people will be from the Southwestern states of Texas, Oklahoma, Arkansas and New Mexico; and a small group will be from the states of Washington and Oregon.

Immediately prior to the luncheon we will have attended our business session, at which there will have been speeches by a few Home Office officials and a few of our leading agents. These speeches will have dealt with the agent's job of selling and servicing insurance, and the progress of our Company.

We would appreciate your talk being of an inspirational nature, along the lines of achievement, success and happiness that can be attained through proper attitudes of faith and practices of the well-ordered personal life.

[fol. 112] The nature of the life insurance agent's work is such that he practically entirely controls his own methods of operation and amount of effort applied to his work. He does not receive the close day by day, nor hour by hour

supervision as is present in many other lines of work. His relationship with his clients is a very personal one, and he is most often motivated, to a large degree, by the service he performs for his clients, in addition to the financial compensation received for the service. Therefore, the degree of success and satisfaction attained from his work depends not just entirely upon his knowledge of life insurance, but to a very large degree depends upon his attitudes toward his opportunities and his zeal to excel.

We hope to print our official program within the next few days and, therefore, would appreciate your advising us as soon as possible the title to be used for your address. We would also appreciate your letting us have a biographical sketch and a picture to be used in our printed program.

As soon as our final time schedule is set, we will advise you the exact time and place for the luncheon.

Sincerely yours,

.....,
Vice President,
Agency Director.

KBS:arp
cc—Dr. LeSourd
cc—Dan C. Williams
cc—John L. Briggs

[fol. 113] December 10, 1956

Dr. Norman Vincent Peale
Marble Collegiate Church
Fifth Avenue at 29th Street, West
New York 1, New York

Dear Mr. Peale:

We now have our time schedule for our Group Luncheon, and it will be in the Sert Room at 12:30, Friday, December 14th.

Looking forward with a great deal of pleasure to meeting you, I am

Sincerely yours,

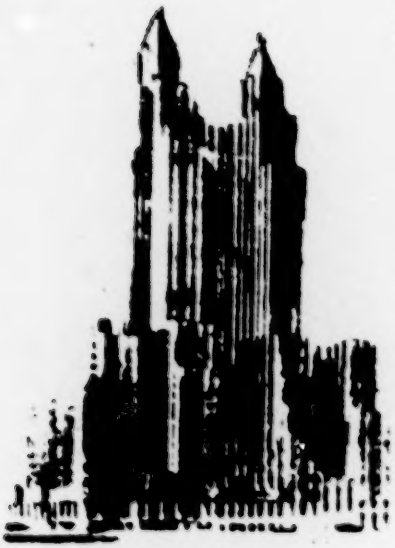
.....,
Vice President,
Agency Director.

KBS:arp

[fol. 114]

GOVERNMENT'S EXHIBIT 1

Your *1956* Convention QUALIFICATION RULES



WALDORF-ASTORIA HOTEL

New York City

Southland Life Insurance Company

[fol. 114]

GOVERNMENT'S EXHIBIT 1

[fol. 115] New York Agency Convention.

December 13-16, 1956.

An agent may qualify for himself and wife to attend the 1956 Convention at the Waldorf-Astoria Hotel, based upon his Paid-for production between May 1, 1955 and October 31, 1956 multiplied by his average persistency rate for that period. No provision has been made for an agent to qualify for himself alone. By meeting the requirements set out below, he qualifies for both himself and wife. Qualifications may be on Volume or Premiums as described below.

Volume Qualification:

1. If Contract is dated prior to May 1, 1955 and a Full-time Life Underwriter, the required Volume, after multiplying the Paid Convention Volume by the persistency average for the qualifying period, will be $100,000.00 of business paid for between May 1, 1955 and October 31, 1956 on at least thirty (30) lives.

2. If Contract is dated after May 1, 1955 and a Full-time Life Underwriter, making satisfactory progress, the Agent and his wife may be invited by the Company, if his paid Convention Volume, multiplied by his average persistency ratio, averages $22,223.00 per month from date of Contract through October 31, 1956, and provided further, however, that there be a minimum of at least $100,000.00 Paid business after applying the persistency factor.

3. The following volume credit will be given to various classes of business listed:

[fol. 116] (a) Full Volume credit will be given to all Ordinary permanent plans, Life Expectancy and Term to 65. Juvenile Estate Builder will count for initial face amount only.

(b) All forms of ordinary term (including Family Income and 20 Year Riders, Income Security, 5, 10, and 15 Year Term) will count for one-half (1/2) of initial face amount.

(c) Group Life (annual Renewable Term and Wholesale) will count one-fifth (1/5) of initial commuted face amount. Group Casualty lines (Accident and Sickness, Hospital Expense, Surgical Expense, Medical Expense, Accidental Death and Dismemberment) will be given Volume credit equal to twenty times the initial annualized premium. No credit will be allowed for additions or increases to existing groups. The maximum Group credit allowed for this Convention will be $100,000.00 before applying persistency factor.

(d) Volume credit of $1,000.00 will be given for each $30.00 (annual basis) of new personal Accident and Health or Hospitalization Premiums Paid. Renewal of Accident and Health or Hospitalization policies will not be considered new business.

(e) Conversion from Term to permanent plans, of insurance shall count full volume, in accordance with Agent's contract.

(f) No credit will be given for any form of Annuities.

[fol. 117] Alternate Premium Qualifications.

1. If Contract is dated prior to May 1, 1955 and a Full-time Life Underwriter, the required annualized Paid Premiums after multiplying the Paid Convention premiums by the persistency average for the qualifying period will be $12,000.00 paid for between May 1, 1955 and October 31, 1956 on at least thirty (30) lives.

2. If Contract is dated after May 1, 1955 and a Full-time Life Underwriter, making satisfactory progress, the Agent and his wife may be invited by the Company, if his Paid annualized Premiums after multiplying the Paid Convention Premiums by the persistency average for the qualifying period average $666.67 per month from date of Contract through October 31, 1956, and provided further that there be a minimum of at least $3,000.00 Paid Premiums after applying persistency factor.

3. The following Paid Premium credits will be allowed to various classes of business listed: (a) Full Premium

credit will be allowed for the annualized premium for all ordinary type plans of permanent and Term life insurance.

(b) Full Premium credit will be allowed for the annualized premium of Accident and Health premiums paid. (Renewal of Accident and Health policies will not be considered new business.)

(c) No Premium credit will be given for any form of Group insurance.

(d) No credit will be given for any form of Annuities.

[fol. 118] (e) Single Premium Life insurance will be given Premium credit equivalent to One Annual Premium for same Plan of insurance.

General Rules:

1. To qualify for Convention credit, business must be received in the Home Office not later than October 22, 1956 and paid for between May 1, 1955 and October 31, 1956. Business will be counted as Paid for when Policies have been issued and settlement for first premium has been received in Home Office.

2. Agents Contract must be in force on date Convention begins.

3. No award of any kind can be made in lieu of Convention trip.

4. We are sorry but it is impossible to make satisfactory arrangements for children to attend the Convention.

5. Business on the life of an Agent or immediate family will count, subject to other rules, if paid for during first twelve months of qualification period. Such business will be excluded if paid for during last six months of qualification period.

6. Qualification must be on Volume alone, or Premiums alone. No combination of the two can be considered.

7. The average persistency rate is calculated by adding the volume persistency rates for all months in the quali-

[fol. 119] fying period and divided the total by the number of months involved.

8. The persistency rate to be used is the persistency rate on Life volume only as shown on Company's regular monthly persistency reports.

9. The total accumulated Life, Accident and Health, and Group Convention business (both volume and premium credits) will be multiplied by the average persistency rate explained above to determine the agent's final Convention credits.

[fol. 120]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18788

C. J. D. RUDOLPH and IRMA M. RUDOLPH,

versus

UNITED STATES OF AMERICA.

ARGUMENT AND SUBMISSION—May 22, 1961

On this day this cause was called and, after argument by Richard A. Freling, Esq., for Appellants, and Meyer Rothwacks, Esq., Attorney, United States Department of Justice, for Appellee, was submitted to the Court.

[fol. 121]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18788

C. J. D. RUDOLPH and IRMA M. RUDOLPH, Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

OPINION—June 27, 1961

Before: JONES and BROWN, Circuit Judges, and DEVANE, District Judge.

PER CURIAM:

The facts are set forth in the opinion of the district court. *Rudolph* v. *United States*, 189 F. Supp. 2. The applicable law is to be found in *Patterson* v. *Thomas*, — F. 2d —, decided by this Court on March 16, 1961. No factual differences call for the application of a different [fol. 122] rule or the reaching of a different result than in *Patterson* v. *Thomas*. The judgment of the district court is

Affirmed.

BROWN, Circuit Judge, Dissenting:

To what was urged by my dissent in *Patterson* v. *Thomas*, 5 Cir., 1961, — F. 2d — at — [No. 18263, March 16, 1961]. I would add brief comments on a few matters bearing emphasis in this record.

The notion that this was one big happy company-paid-for-holiday in New York City where a formal session for the first half day was a mere tip-of-the-hat to give appear-

ances of a working trip is simply unfounded. Mr. Rudolph, the Taxpayer, and his wife—a companion, co-worker, partner-in-fact in the business of life insurance business as well as fellow Taxpayer—had nothing to do with selecting the time, the place, or the program. All was planned, precisely as to moment, locality, event and eligible participants. Moreover, it was not, as the Government seeks to make it appear, a long trek for a half of a day's formal business activity. Those selected by Southland Life Insurance Company were required to travel together. This group of 293[1] made up of 151 men and 142 wives drawn from the South and Southwest were compelled to come to Dallas where they became passengers on "two convention [fol. 123] special trains." The trains departed on Tuesday, December 11. Nearly 48 hours later and about 3:00 p.m. Thursday, December 13, the trains were to arrive at Jersey City, New Jersey, where special chartered buses took the travelers to the Waldorf-Astoria. On Sunday morning similar buses took all from the hotel to the trains for the return trip by the convention special trains arriving back in Dallas some time on Tuesday, December 18.

It is not, therefore, a case of employees getting together for the half-day's session on Friday, December 14, with all remaining time free. Out of the approximately 149 hours from Tuesday, December 11, to Tuesday, December 18, in the neighborhood of 96½ of them were spent in enforced togetherness. It is neither an exaggeration nor does it require more than an amateur license as a lyrist to contemplate that with the rhythmic clickety-clack of the wheels as this train made its way to and from New York City and Dallas, each recipient was reminded of the company message in a syncopated way. And a part of that message was that the company intended that all who were asked to attend would do so. Of course in the psychological complex of a sales business this point was not made crudely. Where in *Thomas* management phrased it as "frowning" on any who declined the trip, Southland has

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[1] The breakdown was as follows: agents 102, wives 97; salaried field assistants 3, wives 3; assistant managers 2, wives 2; managers 17, wives 17; officers 27, wives 23.

euphemisms of equal portent. Its agency vice president, after stating that an agent indicating he would not attend was required to give an explanation, testified that "if he [the agent] doesn't have a proper reason it would be looked upon with serious displeasure."
[fol. 124] This convention trip was meant for the agent's own good. Of course that was equated with the company's good for it was wise psychologically and ethically legitimate to conclude that what was good for the agents was good for Southland. The emphasis was not really the pointed one of increasing sales. That, and the company's benefit, was to come primarily from reassuring the agents that things were not really as bad as they seemed. High officials testified without contradiction that in the life insurance sales business where there are so many "turndowns" by prospects, it is essential to buoy up the spirits of these solicitors. This, experience proves, is best accomplished through the constant, close association on an informal semi-social basis of many successful salesmen who have weathered and overcome similar discouragements.

The insidious purpose—here used with no moral overtones of disparagement—of the company's theme on the minds and wills of its captive audience, was exemplified in the most intense fashion by the Friday luncheon at the Hotel Waldorf-Astoria which ostensibly had no specific relation to selling life insurance. One of the nation's outstanding ministers and public speakers, renowned for his syndicated writings, television and radio appearances, was the luncheon speaker. But even this was not left to chance. The company, by letter, outlined to him the nature of the meeting and suggested that the talk be "of an inspirational nature, along the lines of achievement, success and happiness that can be obtained through proper attitudes of faith and practices of the well-ordered personal [fol. 125] life." After discussing the nature of a life insurance agent's work and the essential motivation of genuine service to his clients, management's estimate of the importance of these things was stamped by this conclusion in the letter. "Therefore, the degree of success and satisfaction obtained from his work depends not just entirely

upon his knowledge of life insurance, but to a very large degree depends upon his attitudes toward his opportunities and his zeal to excel." It is not surprising that the agency vice president testified of this speech that this speaker "did a better job than I had hoped he would" and that the speaker "did mention something specifically about the work of an insurance man * * * " and "he knew more about it than I did."

Unlike *Thomas* which concentrated on the practice followed by that particular life insurance company, this record contains the uncontradicted testimony of the Managing Director of the Life Insurance Agency Management Association. This is an industry-supported organization interested in research, management consultation, education and training, and publications in the life insurance business. From his 30-years' experience in life insurance from the management point of view, this witness outlined why management would consider it good business to spend $84,000, as was done here, on such a convention for its leading agents. He emphasized the importance of personal contact in an informal setting among those who either were top flight producers or had shown promise. This included the opportunities for intimate associations with high level executives under circumstances which afforded ample [fol. 126] time free from the diversion of workaday problems were such meetings undertaken in home office surroundings during working hours.

Indeed, as in *Thomas*, the Government does not question this. It acknowledges, as it must, that this is a legitimate expenditure by the employing life insurance company. But it is precisely at this point that the whole matter reaches its climax: if an event is of such importance in management's eyes, it is certainly got something which the company considers the agent may accept or decline on a take-it-or-leave-it basis. In other words, what the company does for the agents' (and its) good is known by both to be important and expensive. What is tendered must be accepted unless there is a real good excuse. This record, therefore, reiterates with emphasis the actual, psychological, economic pressure of compulsion under which the agent (and his wife) are coerced into taking what is offered.

The future economic livelihood of an agent under a contract granting the employer the right of termination at will is the thing at stake. To take a trip to preserve that security is something not done primarily for personal enjoyment. Conceding that the $560 cost must be attributed to Taxpayer as income, it rejects this record to conclude that it is a matter of voluntary personal enjoyment when the employee *must* take the income, *pay* tax on it, *spend* it precisely as *directed* by the *donor* and then treat it as though this were an ordinary personal junket of a family on a holiday. In a real and vital sense the money is spent [fol. 127] for business and business reasons only. It is indispensable. What is indispensable is certainly ordinary and necessary.[1]

In the realistic formula of "ordinary and necessary," life insurance agents under such compulsion should have like treatment accorded to others. Deductions have been allowed as "ordinary and necessary" to clergymen attending a church convention; to expenses of an employee at-

[1] Both on this underlying issue and the subsidiary one of allocation and apportionment the relative cost to be able to attend the formal business sessions in relation to the total $560 attributed income, is substantial either on the basis of the husband alone or husband and wife together. In other words it cost Taxpayer alone a minimum of $215.41 to be able to attend the half-day sessions in New York. These facts are not disputed:

Expense	Cost per person	Cost per couple
Meals in New York		
1 breakfast	$ 2.00	$ 4.00
1 luncheon at Waldorf	6.00	12.00
Round trip train fare	119.40	238.80
Pullman cost	37.13	74.26
Rail meals	30.54	61.08
Baggage, porter & dining car tips	8.23	16.46
Hotel New York (4 days) approximately 1/3 on basis 3 days actual cost	12.11	24.22
	$215.41	$430.82

Marion D. Shutter, 2 B.T.A. 23

tending conventions of a related business group;[4] to a lawyer attending a meeting of the American Bar Association;[5] to a legal secretary attending the national convention of the National Association;[6] to physicians attending medical conventions;[7] to certified public accountants attending con- [fol. 128] ventions;[8] to university teachers in attending conventions or scientific meetings;[9] to professional cartoonists attending political conventions;[10] to persons attending the Red Cross Convention;[11] to school teachers attending summer school;[12] to attorneys attending an institute on Federal taxation;[13] to employees sent to refresher courses to become more acquainted with new processes in the industry;[14] to a furniture store sending its buyers to the annual furniture mart;[15] to representatives to annual conventions of trade associations;[16] and to an insurance agent away from home on business.[17]

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[4] Ratterman et al., 7 T.C.M. 476, affirmed without opinion, 6 Cir., 1949, 177 F.2d 204.

[5] Ellis v. Burnet, D.C.Cir., 1931, 50 F.2d 343.

[6] Rita M. Callinan, 12 T.C.M. 170.

[7] Robert C. Coffey, 1931, 21 B.T.A. 1242; Wolfe v. McCaughn, E.D.Pa., 1933, 17 AFTR 1007; Ray Upham, 1929, 16 B.T.A. 950; J. Bentley Squier, 1928, 13 B.T.A. 1223; Cecil M. Jack, 1928, 13 B.T.A. 726.

[8] Charles O. Gunther, Jr., 54,287 P-H Memo T.C.

[9] Alexander Silverman, 6 B.T.A. 1328.

[10] Jan N. Darling, 4 B.T.A. 499.

[11] Henry Cartan, 30 T.C. 308.

[12] Hill v. Commissioner, 4 Cir., 1950, 181 F.2d 906.

[13] Coughlin v. Commissioner, 2 Cir., 1953, 203 F.2d 307.

[14] Pacific Grape Products Co. v. Commissioner, 17 T.C. 1097 (reversed on other points, 9 Cir., 1955, 219 F.2d 862).

[15] Finkenburg's Sons, Inc., 1952, 17 T.C. 973.

[16] I.T. 2602, 1931 Cum. Bull. 130.

[17] Summerour v. Allen, M.D.Ga., 1951, 99 F.Supp. 318.

This Court recently held in *Williams* v. *Patterson*, 5 Cir., 1961, 286 F.2d 333, that expenditures made by a railroad conductor on his layover period of six hours were deductible even though all of the activities could narrowly be classified as "personal activities." In doing so we said: "although most of these factors in a narrow sense affect the personal convenience of the traveler, the motivation for sleep and rest arises from the exigencies of the employment, the business demands of the employer, the relation of the employee to his employer. * * * " Then we concluded the correct rule to be that expenditures made "in order to meet the exigencies of his employment or the busi-[fol.129] ness demands of his employment" are properly deductible. 286 F.2d 333 at 339-40.

The contemporary interest in possible legislative changes suggests that perhaps the understandable, realistic "ordinary and necessary" formula produces results unsatisfactory to the revenue, undesirable from a socio-economic point of view or impossible of orderly administration. That may be so but the remedy is for Congress. Until then we have to view the formula in the light of the facts. Here, in my judgment, these facts show an honest, legitimate, ethical expense. More than that these facts compel a finding of absolute business compulsion when viewed from the standpoint of the agent's economic security.

I therefore dissent.

[fol. 130]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18788

C. J. D. RUDOLPH and IRMA M. RUDOLPH,

versus

UNITED STATES OF AMERICA.

JUDGMENT—June 27, 1961

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Brown, Circuit Judge, Dissenting."

[fol. 131]

IN UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 18,788

C. J. D. RUDOLPH and IRMA M. RUDOLPH, Appellants,

versus

UNITED STATES OF AMERICA, Appellee.

APPELLANTS' MOTION FOR REHEARING—Filed July 18, 1961

Now comes C. J. D. Rudolph and Irma M. Rudolph, Appellants, and move this Honorable Court to grant to them a rehearing in the above-styled cause, and as grounds for

said motion set down and assign the following, separately and severally:

I.

This Court erred in holding that the payment by the Company of the expenses attributable to Appellants' travel to and attendance at a business convention sponsored by the company constituted taxable income to the Appellants for Federal Income Tax purposes.

[fol. 132]

II.

This Court erred in holding that no part of the expenses paid by the Company which were attributable to Appellants' travel to and attendance at the Company's convention were deductible by Appellants as ordinary and necessary business expenses, in the event that the payment of such expenses for Appellants constituted taxable income to them for Federal Income Tax purposes.

III.

This Court erred in failing to hold that the findings of the Trial Court were mistaken conclusions and, therefore, clearly erroneous.

IV.

This Court erred in affirming the Judgment of the Trial Court.

Respectfully submitted,

Felix Atwood, B. Thomas McElroy, Richard A. Freling, 1900 Mercantile Dallas Building, Dallas 1, Texas, Attorneys for Appellants.

[fol. 133] Certificate of Service (omitted in printing).

Certificate of Counsel (omitted in printing).

[fol. 134] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Title omitted]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

ORDER DENYING PETITION FOR REHEARING—July 28, 1961

Before: JONES and BROWN, Circuit Judges, and DEVANE, District Judge.

PER CURIAM:

It Is Ordered that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby Denied.

BROWN, Circuit Judge, Dissenting.

[fol. 135] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 136]

SUPREME COURT OF THE UNITED STATES

No. 396—October Term, 1961

C. J. D. RUDOLPH, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—November 13, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
SEP 11 1961
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

FELIX ATWOOD,
RICHARD A. FRELING, of
TURNER, WHITE, ATWOOD,
MEER & FRANCIS,
1900 Mercantile Dallas
Building,
Dallas 1, Texas,
Attorneys for Petitioners.

WARLICK LAW INC — 2363 VALDINA STREET — DALLAS — RI 1-6711

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

C. J. D. Rudolph and Irma M. Rudolph, Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on June 27, 1961.

OPINIONS BELOW

The opinion and judgment of the Federal District Court (R. 96, 100, Appendix A) is reported in *189 F. Supp. 2 (1960)*. The opinion of the Court of Appeals for the Fifth

Circuit (R. 121), Appendix B), being No. 18788 of that Court, is not yet reported in the official Federal Reporter, but is published in *60-2 U. S. T. C. 9707 (1961)*.

JURISDICTION

The judgment (R. 130, Appendix B) of the Court of Appeals was entered on June 27, 1961. A timely application for rehearing (R. 131) was denied on July 28, 1961 (R. 134, Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether an insurance agent realizes taxable income when the insurance company for which he works pays his and his wife's expenses of traveling to and attending a convention of the company's agents where, because of concern for his economic security, he is compelled by the company to attend, has no control over the mode of travel, accommodation or activities, and the convention is designed and intended primarily for the business purposes of the company not as compensation to the agent.

2. Whether, in the alternative, the reasonable expenses of an insurance agent in traveling to and attending a convention of agents of the insurance company for which he works constitute ordinary and necessary expenses of carrying on a trade or business where the business of the convention is directly related to his job and where, because of concern for his economic security, he is compelled by the company to attend.

3. Whether, in the alternative, the reasonable expenses of an agent in bringing his wife to a business convention under the foregoing circumstances constitute ordinary and necessary expenses of carrying on a trade or business where, as part of a long-range and continuous program of business education, the company expects that the wife attend and would view with disfavor her failure to attend without adequate reason.

STATUTES INVOLVED

Internal Revenue Code (1954), Section 61. 26 U. S. C. 61.

Internal Revenue Code (1954), Section 62(1) and (2). 26 U. S. C. 62(1) and (2).

Internal Revenue Code (1954), Section 63(a). 26 U. S. C. 63(a).

Internal Revenue Code (1954), Section 161. 26 U. S. C. 161.

Internal Revenue Code (1954), Section 162(a). 26 U. S. C. 162(a).

REGULATIONS INVOLVED

U. S. Treas. Reg., §1.62-1(a) (1954), 26 C. F. R. §1.62-1(a).

U. S. Treas. Reg., §1.62-1(c) (1) (1954), 26 C. F. R. §1.62-1(c) (1).

U. S. Treas. Reg., §1.162-2 (1954), 26 C. F. R. §1.162-2.

STATEMENT OF THE CASE

Petitioners instituted suit on October 9, 1959 (R. 20) in the Federal District Court for the Northern District of Texas against Respondent to recover $126.90 in income tax, together with interest thereon in the amount of $10.19, for the calendar year 1956, which was illegally and erroneously assessed against and collected from Petitioners by the District Director of Internal Revenue for the district in which Petitioners reside (R. 9). The cause came to trial before Honorable T. Whitfield Davidson, sitting without a jury, and on September 28, 1960, judgment was entered for Respondent (R.).

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit, and on June 27, 1961, that Court affirmed the judgment of the trial court per curiam, one Judge dissenting (R. 130, Appendix B).

Petitioners timely filed their joint Federal income tax return for the calendar year 1956 (R. 17), and duly paid the tax thereon. Subsequent thereto, the Commissioner of Internal Revenue assessed a deficiency in income tax against Petitioners in respect of said calendar year 1956 in the amount of $126.90. The deficiency resulted from the inclusion by the Commissioner in Petitioners' income of expenses paid by Southland Life Insurance Company (sometimes hereinafter referred to as the "Company") in connection with Petitioners' travel to and attendance at a business convention organized, sponsored and conducted by the Company and held in New York City from December 13 to December 16, 1956 (R. 104). Petitioners paid the assessed deficiency in income tax,

together with interest thereon, and filed a Claim for Refund. The Claim for Refund was denied, and Petitioners filed suit in this cause (R. 20).

Petitioner, C. J. D. Rudolph, has worked for the Company since September 14, 1932 (R. 16), as an ordinary life insurance agent (R. 42). He is an independent contractor and not an employee of the company.

All aspects of the convention were determined by the Company, including the time, place, location, character of hotel accommodations for those attending, and all activities at the convention (R. 22). The Company also chartered special trains to provide transportation to the convention, and all persons attending were required to abide by travel and accommodation arrangements prescribed by the Company (R. 21, 22). Petitioners spent approximately 84 hours on the chartered trains, during which time they had the opportunity to exchange ideas and discuss mutual problems with other agents and their wives and with senior officers of the Company (R. 27).

The entire expense attributable to Petitioners' travel to and attendance at the convention, with the exception of $30.00 given to Petitioners' as an allowance for unplanned meals in New York City, was paid directly by the Company (R. 22). The parties have agreed that the total amount of travel and convention expenses allocated to Petitioners was approximately $560.00 (R. 58), and it is the inclusion of this amount of income which produced the asserted deficiency in income tax of $126.90. Respondent concedes the reasonableness of the expense.

The Company sponsors a national convention approximately every eighteen months (R. 29) to serve a business function deemed essential by the management of the Company in the training of its agents and to the continued growth of the Company itself (R. 50, 62). The convention permits the Senior officers of the Company to acquaint themselves on a personal basis with the Company's agents, to participate in close informal discussions and guidance pertaining to the agent's job, and to report the accomplishments of the past and the projections and objections for the ensuing year (R.). The convention provides professional instruction by outstanding representatives of management and selling in a setting away from the usual concerns of business (R. 73, 78). And above all, the close association and contact among agents and Company officials and discussion of common problems with others similarly situated helps agents to learn tried or new methods of best performing their jobs and gives them appreciation of their mutual problems (R. 27). The Vice-President thought the informal contacts among fellow agents to be the most important aspects of the convention business (R. 74).

The agents attending the Convention are chosen by the Company in accordance with certain preannounced standards (R. 36), which vary from year to year but which are always based in some manner on the production and conservation of life insurance (R. 54, 72). The standards are determined so as to secure a cross section of the agents who are most likely to benefit from the professional instructions, association and

information provided at the Convention and who, therefore, are most likely to contribute to the continued success of the Company (R. 21, 72).

Even though an agent qualifies to attend the convention, he may not attend unless he is invited by the Company (R. 54). Those agents invited are required to attend, and adequate reasons must be presented if an agent or his wife cannot attend (R. 25, 63, 73). Agency contracts are terminable at will, or on short notice (R. 45, 46).

If an agent is invited to attend a Company convention but declines or fails to attend, he receives no cash, cash equivalent, bonus, award, compensation or other benefit (R. 31, 63).

The Company considers that an agent's wife plays an important role in his career (R. 61). The insurance agent's wife's role in personal contacts, community projects, civic enterprises, and other areas of community life are of tremendous importance to the success or failure of the agent, and therefore, of his ultimate worth to himself and to his company (R. 46). The Conventions sponsored by the Company are so designed and prepared as to furnish a program of instruction and association with other wives which serve to teach an agent's wife how to help her husband (R. 62). The attendance of an agent's wife is deemed highly desirable by the Company's management (R. 52). So vital does Southland consider the wife's part in its business that upon the employment of an agent the Company requires an interview with the wife in the home to assure she is made aware of the

contribution which she may make to her husband's success. The Company distributes a booklet, *A New Partnership Has Been Formed*, to the wives which evidences its interest in stimulating the wife's role in the selling of insurance (R. 61). In addition, letters are occasionally written to the wife concerning any special sales effort that might be desired or promoted (R. 62). The Company has a monthly publication for the agents and employees that is mailed to their homes so that the wife will have a convenient opportunity to see the magazine and read it (R. 62). Furthermore, the Company has determined that the presence of the wives at the Convention keeps the meetings pitched on a high and attentive plane, where the purpose of the Convention is best served (R. 62). The Company provided no liquor and no cocktail parties were held (R. 46).

Mr. J. Harry Wood, Managing Director of the Life Insurance Agency Management Association, testified that it was wise business practice to have an agent's wife at a convention and to indoctrinate her with her prospects and responsibilities as the wife of an insurance agent (R. 84, 85).

Conventions of a similar nature are traditional in the life insurance industry, having been common long before income taxes were a major business consideration, and are held by most, if not all, of the life insurance companies (R. 78).

New York City was selected as the convention site by management of the Company because of convenient transportation facilities, adequate hotel accommodations, accessibility to guest speakers, and interest as a convention center (R. 67, 68).

Petitioners left Dallas by special trains on June 11, 1956, and arrived in New York on the evening of December 13 (R. 104). The business session of the convention commenced at 9:30 A.M. on December 14, and followed the agenda set forth hereinafter (R. 108, 109). First, there was an invocation, by Neal H. Wright, Lubbock, Texas, followed by an address, "Welcome to New York", by Ben H. Carpenter, Executive Vice President. There followed a panel discussion of agents with the theme "Success Through Planning", in which some of the leading agents of the Company participated. Glenn M. Brooks, Vice President and Director of A & H Insurance, spoke on "The 1957 Agency Activity Program", and Dan C. Williams, President of the Company, addressed those attending on "Our Southland Life Future". John W. Carpenter, Chairman of the Board, then discussed "Your Company and Mine", after which the meeting was adjourned at 12:30 P.M. to luncheon in the Sert Room. Presiding at the luncheon was Field Scoville, Vice President and Superintendent of Ordinary Agencies, who introduced the principal speaker of the convention, Dr. Norman Vincent Peale. In accordance with written suggestions (R. 111) to talk about the lines of achievement, success and happiness that can be attained through proper attitudes of faith and practices of the well ordered personal life, Dr. Peale spoke about "Success Through Right Thinking". Other activities at the convention included a sight-seeing tour beginning at 2:30 P.M. and ending about 5:30 P.M. on December 14 (R. 104); a breakfast and fashion show for

ladies only at 8:45 A.M. on December 15 (R. 105), and an evening at the Copacabana, beginning at 6:30 P.M. on the same day (R. 106). Free time was also scheduled, so that the agents and their wives in attendance might be able to see a special Christmas show at Radio City Music Hall, radio and television shows, or other points of interest (R. 106). The various activities of the convention could not and did not detract from the primary business of stimulating the enthusiasm of the agents and encouraging their discussion of the means and methods of selling life insurance with other agents (R. 28, 90); rather, the activities were so designed to accomplish this very end (R. 84). Petitioners returned home by special trains, leaving New York on December 16 and arriving in Dallas on December 18.

The convention was not considered and did not, in fact, constitute any part of the agent's vacation. Petitioner, C. J. D. Rudolph, testified that "Whenever I take a trip I like to get away from it all, not have any schedule, and do as I please (R. 46)."

The District Court held that the Company was "just doing a gracious, magnanimous thing of awarding those leading agents a trip", and that the value of that trip was income in "the nature of a bonus, reward, and compensation for a job well done." On the other hand, the District Court denied a deduction to Petitioners for a like amount on the ground that the trip was primarily "a pleasure trip in the nature of a vacation". The Court of Appeals for the Fifth Circuit affirmed in reliance upon its prior decision in *Patterson v. Thomas,* *F. 2d* , *61-1 U.S.T.C. 9310 (5th Cir.*

3/16/61), with Honorable John R. Brown, stating in dissent "Here, in my judgment, these facts show an honest, legitimate, ethical, expense. More than that these facts compel a finding of absolute business compulsion when viewed from the standpoint of the agent's economic security."

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals presents for the first time the issue of whether an employee realizes taxable income when his employer requires him and his wife to attend a business convention of such employees and pays their expenses in connection therewith, which issue is of such widespread importance to individual taxpayers and the general business community as to warrant review and resolution by this Court.

2. The decision of the Court of Appeals likewise presents for the first time the issue of whether an employee may deduct as ordinary and necessary business expenses the expenses which, at the direction of his employer, he is compelled to incur in traveling to and attending a business convention of the employer's employees, which issue is of equally widespread importance and should be resolved by this Court.

3. Finally, the decision of the Court of Appeals presents for the first time the issue of whether an employee may deduct as ordinary and necessary business expenses the expenses which, at the direction of his employer, he is compelled to incur in bringing his wife to a business convention of the employer's employees.

I.

The issues herein presented have never been considered by the Court, although it has enunciated basic principles which bear directly on their resolution.[1] The amount of tax involved in this case is small, and the issues are deceptively simple. It is manifest, however, that no tax case in recent years will have a more widespread effect on taxpayers and business than will the instant case, and that the issues go to the very essence of our concepts of income and deduction. More directly, it will materially affect the traditional method chosen by life insurance companies to encourage and educate their agents and thereby to promote the financial success of the companies. Two phenomenon of everyday business life—the company convention and the mandatory invitation by the company for the employee to participate in its affairs—are here subject to scrutiny by the Court, and a decision on the questions presented will test whether, in the absence of specific congressional disapproval, the courts, in applying the taxing statutes, can ignore the business realities of these phenomenon and substitute their own judgment for that of management.

The District Court held, and the Court of Appeals affirmed, that the trip was in the nature of a bonus or compensation, despite uncontroverted testimony to the contrary by the Company's representatives and by an independent expert in the field. There was ample evidence before the Court that the Company's decision to hold the convention was based upon

[1] It is intriguing to note that Petitioners' position appears never to have been challenged previously by the Internal Revenue Service, although conventions of life insurance agents have been prevalent since 1924. See Report No. 15, Life Insurance Sales Research Bureau (November, 1924).

the desire, as a matter of business judgment after long individual and nationwide experience, to instruct the agents, to build morale, create enthusiasm and interest in sales promotion, enlist the aid of the wives, and in general further the business of the agents and Company. Respondent would make much of the fact that the agents invited were selected on the basis of production, but this was nothing more than an intelligent and practical method for choosing the agents who would most benefit by the convention[2].

This Court recently had occasion to reiterate the importance of looking to the intent of the payor or transferor in determining the taxability of the recipient. The question before the Court in *Commissioner v. Duberstein, 362 U. S. 278 (1960)*, was whether a Cadillac received by a taxpayer from a business associate constituted a gift or taxable compensation. In rejecting the Government's insistence on a new and broad test, the Court said:

> "We take it that the proper criterion, established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. Further than that we do not think we can profitably go."

So it is here. The intent of the Company in paying the convention expenses of Petitioners is of vital significance, yet the Court of Appeals apparently dismissed this fact without consideration. Unless the uncontradicted testimony before

[2] "What type of person are you going to invite to your conference? Can you draw up a specification of the sort of person you believe will contribute the most?

"What you want is a group of experienced people with keen minds, who are determined to find out all they can about the problem and contribute on the basis of that knowledge to its solution." The Royal Bank of Canada Monthly Letter, Vol. 39, No. 2, page 1 (February, 1958).

the Court is to be disregarded entirely, a determination must be made whether the payment of Petitioners' convention expenses constitute income to them *notwithstanding the absence of any intent to compensate*. Stated otherwise, Petitioners find no argument with the proposition that intended compensation not expressly excluded by Congress is includible in income regardless of the nature or form which such compensation may take. However, where the value of expenses incurred by the Company (and Respondent concedes same to be deductible by the Company) for its benefit are not intended as compensation to one who happens to be the object of those expenditures, all the attendant facts and circumstances (including the nature of the thing received and the dominant purpose of the payor) must be examined in order to decide whether or not under our scheme of taxation the recipient constructively realizes taxable income.

It is axiomatic that not every economic gain or intangible benefit received by a taxpayer falls within the generic concept of income for Federal income tax purposes. Thus, meals and lodging furnished to an employee for the convenience of the employer were long determined by the courts not to represent the receipt of income. See *2 Mertens, Law of Federal Income Taxation*, §*11.16*. This judicial conclusion is in no way contradictory to the fact there is an element of gain to the employee in that he received substinence and quarters which he otherwise would have had to supply for himself. He had nothing he could take, appropriate, use and expend according to his own discretion rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a

place to work and in the supplying of tools and machinery to work with. That personal needs or wants of the employee were satisfied was merely incidental to the business of the employer.

Likewise, the furnishing of so-called "fringe benefits" to employees at the place of work such as a library, swimming pool, parking facilities, air conditioning, etc., do not constitute income pro rata to the employees. Nor does special instruction or training provided on or off the employer's premises constitute income, although obviously the employee benefits therefrom. One may attend a professional convention and gain new knowledge at the expense of the employer, but this is not taxable income.

The very heart of the logic is this: there are certain economic or intangible benefits an employer may provide for his employees which do not constitute income to the employees because the value thereof is subjective, because the employees lack discretion or control of over their selection, and *because the underlying objective is not to compensate the employee but to further the business of the employer.*

Petitioners do not intend to suggest that they fall within the ambit of Section 119, IRC of 1954; obviously, that section pertains only to meals furnished on the premises or lodging furnished on the premises as a condition to employment. But section 119 was designed to codify the law in a narrowly-defined area. See Sen. Rep. No. 1622, 83rd Cong., 2d Sess., p. 190. Prior to the enactment of Section 119, the taxability of meals and lodging furnished to employees turned on two

points: (1) were the meals and lodging intended as compensation, and if not (2) were they furnished for the convenience of the employer. See Mim. 6472, 1950-1 Cum. Bull. 15. The cases and rulings indicate that meals and lodging not intended as compensation and meeting the convenience test did not constitute income to the employee. See *2 Mertens, supra.* Thus, it must be conceded that *certain* benefits conferred by an employer upon an employee do lie beyond the framework of taxable income where the purpose thereof is to benefit the employer's business.

Has this been changed? Section 119 codified the case law, and modified it to the extent of eliminating the fact question of intent to compensate as a determinant where meals and lodging are furnished in kind. But it did not destroy the rationale of earlier decisions on the question as valuable precedent in related or analogous areas; indeed, the Committee Reports and the Commissioner's own regulations recognize that today cash allowances for meals and lodging are includible in income *only to the extent that such allowances represent compensation.* See Sen. Rep. No. 1622, *supra;* Reg. §1.119-1(c)(2).

In the instant case, Petitioners received nothing over which they had control; they did not select the convention site or mode of travel, nor did they choose the activities of the convention. Whatever benefits or gains they derived from attending were subjective; whatever benefits or gains they derived were incidental to and dictated by dominant business reasons arrived at in good faith by the Company. This is not income under the Internal Revenue Code.

II.

Section 63(a), contained in Part I, Subchapter B, Chapter 1, IRC of 1954, specifies that "the term 'taxable income' means gross income, minus the deductions allowed by this chapter * * *." Section 161, contained in Part VI, Subchapter B, of Chapter 1 provides that in computing taxable income under section 63(a) "there shall be allowed as deductions the items specified in this part * * *." Section 162 enumerates certain trade or business expenses which fall within the foregoing provisions:

> "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> "(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;"

There is no dispute in the instant case about the reasonableness of the expenditures, nor that the Petitioner, C. J. D. Rudolph, carried on a trade or business as an insurance agent.[3] Moreover, it is obvious that Petitioners were away from home. Thus, in ruling on the deductibility of Petitioners' expenses three questions must be answered: (1) were the expenditures ordinary; (2) were they necessary; and (3) were they incurred in connection with Petitioners' pursuit of his trade or business? In seeking a decision on these ques-

[3]Although C. J. D. Rudolph is referred to for convenience as an employee of the Company in the sense that he is employed on a continuing basis as a commissioned agent, his legal status is that of an independent contractor.

tions "Life in all its fullness must supply the answer to the riddle." *Welch v. Helvering, 290 U. S. 111, 54 S. Ct. 8 (1933).*

"Ordinary" expenses are not necessarily habitual or normal expenses in the sense that the same taxpayer will have to make them often. *Welch v. Helvering, supra. Rolunson Land & Lumber Company of Alabama v. United States, 112 F. Supp. 33 (S. D. Ala. 1953); Canton Cotton Mills v. United States, 94 F. Supp. 561 (Ct. Cl. 1951).* The term "ordinary and necessary expense", however, must be given its natural and common connotation. *Tinkoff v. Commissioner, 120 F. 2d 564 (7th Cir. 1941).* An ordinary expense may be one which happens but once in the taxpayer's lifetime if it is a common or frequent occurrence in the type of business in which the expenses are incurred. *Deputy v. DuPont, 308 U. S. 488, 60 S. Ct. 363 (1940).* The test of a deduction made as an ordinary and necessary expense in carrying on a trade or business is said to be its natural normality and soundness as a business expenditure, in both nature and amount, by general commercial standards, in practical application to the specific situation. *Bryers v. Commissioner, 199 F. 2d 273 (8th Cir. 1952).* Whether an expenditure is both ordinary and necessary will depend upon whether the "average hard-headed businessman" might have made the expenditure. See *4 Mertens, Law of Federal Income Taxation, §25.09 at 34.*

The evidence of customs and actions of organized professional organizations is admissible on the issue of whether certain expenses of a member of that profession at a given time and place are deductible as an ordinary and necessary

business expense. *Lilly v. Commissioner, 343 U. S. 90, 72 S. Ct. 497 (1952).* One criterion set up in the Regulations is that there be a "sufficient" relationship between the taxpayer's trade or business and his attendance at the convention. In *Pacific Grape Products Company, 17 T. C. 1097 (1952)*, the expenses of a corporation for travel of employees to schools where annual refresher courses were given, acquainting the employees with new processes in the industry and for travel and contacting financial sources and in conforming with governmental regulatory bodies were held to be a business purpose.

The cases are legion which establish that expenses incurred in connection with attendance at professional, business or technical conventions are "ordinary and necessary" in our contemporary society and business community and therefore constitute allowable deductions. A furniture store was permitted to deduct its costs for sending its buyers to the annual furniture mart. *Finkenburg's Sons, Inc., 17 T.C. 973 (1952).* The expense of sending representatives to annual conventions of trade associations has been held as a policy matter by the Internal Revenue Service to be deductible. I. T. 2602, 1931 Cum. Bull. 130. The expense of sending representatives to the conventions of the Chambers of Commerce of the United States has been ruled to be deductible in a letter signed by C. R. Nash, Assistant to the Commissioner, in reply to a letter for that purpose dated December 22, 1926. Expenses of physicians in attending meetings of medical societies are held to be deductible. *Wolfe v. McCaughn, 17 AFTR 1007*

(E. D. Pa. 1933); Robert C. Doffey, 21 B. T. A. 1242 (1931); Ray Upham, 16 B. T. A. 950 (1929); J. Bentley Squire, 13 B. T. A. 1223 (1928); Cecil M. Jack, 13 B. T. A. 826 (1928).

Others whose expenses in attending conventions and meetings have been held deductible are: Lawyers, *Wade H. Ellis, 15 B. T. A. 1075, aff'd, 50 F. 2d 343 (1929);* Clergymen, *Marion D. Shutter, 2 B. T. A. 23 (1925);* University professors in attending scientific conventions, *Alexander Silverman, 6 B. T. A. 1323 (1927);* Secretaries in attending a convention of the National Secretaries Association, *Rita N. Callinan, 1953 P-H T. C. Memo, Dec. 53,055; Charles O. Gunther, Jr., 1954 P-H T. C. Memo, Dec. 54,287;* Professional cartoonists in attending political conventions for purposes of gathering information necessary in his professional activities, *J. N. Dowling, 4 B. T. A. 499 (1926);* Motion picture stunt actors, *Charles Hutchison, 13 B. T. A. 1187 (1929);* Insurance agent away from home on business, *Summerour v. Allen, 99 F. Supp. 318 (M. D. Ga. 1951);* Lay member of a church attending a church convention, Rev. Rul. 58-240, 1958-1 Cum. Bull. 141; Legionaire attending American Legion Convention, *Henry Carton, 30 T. C. 28 (1958);* Lawyer attending tax institute, *Caughlin v. Commissioner, 203 F. 2d 307 (2d Cir. 1953).*

The instant case is unique and differs from those cited above in that the purpose of the convention was to bring together the scattered employees of a single large business concern rather than independent members of a particular

profession or vocation or people having some common but otherwise unrelated business interest.[4] This is the first time (together with *Patterson v. Thomas*, *supra*), that such a convention has been subject to analysis by this or any other court with reference to the "ordinary and necessary" requirement for business deductions.[5] However, since 1924 life insurance companies have almost universally sponsored conventions of the type here involved, based upon the business decision that the agents, and thereby the companies, benefit from the knowledge and motivation derived by the agents from the convention.[6] It seems reasonable to assume, therefore, that C. J. D. Rudolph's expenditures were as "ordinary and necessary" as were those of the taxpayers in each of the foregoing cases, if attendance at the convention was in pursuit of his trade or business.

Thus, the issues have been narrowed to one final inquiry: was the dominant purpose and motive of Petitioners in attending the convention one of business or pleasure? Reg. §1.162-2(d) provides that:

> "Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each

[4]See Rev. Rul. 59-316, 1959-2 Cum. Bull. 57, in which it is indicated that the taxpayer claiming a deduction for expenses incurred in connection with attending a convention must show that he attended to further his own business. See also Rev. Rul. 60-16, 1960-1 Cum. Bull. 58, wherein it is suggested that an employee may deduct in computing adjusted gross income the expenses which he incurs in the performance of services as an employee in attending a business convention.

[5]The Commissioner of Internal Revenue recently announced that he acquiesced in the deduction of expenses incurred by individuals in attending conventions of the National Association of Internal Revenue Employees (a convention of employees of a single organization). CCH Fed. Tax Serv., Current Report No. 23, April 19, 1961.

[6]See Life Insurance Sales Research Bureau, Report No. 15 (November, 1924); Appendix E, page 76.

> case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible."

The Internal Revenue Service ostensibly reads into the foregoing regulation a requirement of primacy, as spelled out in Reg. §1.162-2(b)(1):

> "If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible."

It cannot be questioned that the formal business sessions of the convention (as summarized in The Statement of the Case) were directly and materially related to C. J. D. Rudolph's trade or business—in fact, his trade or business was the very subject and theme of those sessions. However, in finding that the trip was primarily for pleasure the Internal

Revenue Service, and later both the District Court and the Court of Appeals, attached great significance to the relative times spent in formal session, travel and other activities and to the fact that the convention was held in New York.[7] The basis for this rationalization, at least in part, apparently is Reg. §1.162-2(b)(2):

> "Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary."

There are two obvious and fundamental errors in applying to the instant facts a comparative analysis as suggested in the regulations, since such an analysis would ignore the business purpose of the Company, the format of the convention trip, the industry-wide practice and the practical compulsion to attend, in determining whether Petitioners' expenses are deductible.

First, the court below emphasized the relative times spent on planned entertainment, informal activities, and formal

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[7] *But cf.* News Release, IR-394, August 3, 1961, 4 P-H Fed. Tax Serv., par. 32,375, wherein it was stated: "He [the Commissioner] said an analysis of a large group of cases from all parts of the country involving a variety of travel and entertainment expenses did not reveal that any expenses were disallowed merely because of the site of a convention or meeting. * * *"

business sessions, as if this breakdown was conclusive evidence of a non-business purpose. Furthermore, the court apparently viewed the activity of travel and time spent in traveling as more or less neutral factors, the costs of which derive their tax significance from the nature of the primary activity at the destination.

The court's interpretation of the statute is inapposite to the situation before the Court, and any distinction between the travel, entertainment and informal times, on the one hand, and the formal business sessions, on the other hand, is ill-founded. This is not a case where the taxpayer and his wife embarked on a pleasure jaunt independently of any planned program and at their destination incidentally engaged in business. Here, the Petitioners had no discretion as to the mode and time of transportation, their accommodations, the activities of the convention, or any other control over the determinations of the Company as to what was in its best interest. Here, the entire convention (from the moment of the agents' departure to the time of his return to his place of business) and the objectives and business purpose of the Company are in issue.

Petitioners spent almost five full days in the enforced and close companionship of specially chartered trains, during which time the sale of life insurance was the dominant topic of conversation.* This was normal, expected and intended by the Company; it was not mere happenstance that the Company *required* all those attending the convention to travel together. Similarly, the time spent in informal activity did

*See Appendix E, page 77.

not detract from the business character of the convention. Although the formal meetings lend continuity to the convention and obviously play an integral part in the instruction and motivation of the agents, perhaps the most invaluable lessons are learned through the give and take of casual conversation among agents. When lawyers get together they talk law; when doctors get together they talk medicine; when insurance men get together, particularly under the circumstances here involved, they talk insurance. Every lawyer knows that the principal benefit of attending a Bar Convention is not derived from what formal lectures are scheduled but rather from the personal relationship among fellow members of the Bar—talk of a new case, an unusual agreement; talk of common problems; talk about economics of the profession. This was part of the stimulus which the Company wanted to provide. This was the very objective which, through balanced programming, the company desired to achieve.[9] From the moment that the agents and officers of the Company, and their respective wives, boarded the train, to the moment that they returned to Dallas, a dominant business purpose was interwoven into all their activities. The exchange of ideas and methods in informal conversation was as much a part of the plan as the formal meetings.

Second, it is one thing to characterize a particular activity as being essentially personal or for business when viewed from the standpoint of preconceived contemporary ideas *where such activity is undertaken voluntarily by the taxpayer.*

[9]Entertainment at a convention is based upon the realization that the delegates are human beings and not mere mechanical cogs in the company's machine. As such, it has a place in every convention, regardless of size. See Life Insurance Sales Research Bureau, *supra* n. 6.

It is an entirely different thing *when the activity in question is undertaken not voluntarily but as a matter of absolute business compulsion.* To pose a hypothetical situation, suppose that Mr. Doe is ordered by his employer to entertain an important visiting executive at the country club and to play a round of golf with him. Mr. Doe may or may not like to play golf, and he may or may not like the atmosphere or food at the country club. The payment of his expenses should not be income to him in the first instance, but if it is, he should be allowed a deduction for a like amount because he did not engage in the activities to satisfy his personal whims or desires, but rather to fulfill his business obligations to his employer. The fact that he actually liked to play golf, and therefore enjoyed himself, is irrelevant to the tax consequences of his expenditures.

In the instant case, C. J. D. Rudolph's agency contract was terminable at will, and he knew that the Company expected him to attend the convention. Refusal to attend without adequate reason would be tantamount to placing his economic security and association with the Company on the chopping block. His decision to attend was a natural and prudent businessman's response to the dictates of his employer. What more does the law demand? As Honorable John R. Brown said in dissent "In a real and vital sense the money is spent for business and business reasons only. It is indispensable. What is indispensable is certainly ordinary and necessary." Certainly, what is indispensable to his business is in pursuit of his business. If the management of a successful company believes that is the best way to further its business, and if the agents attend the convention not only

because of the implied command but also because their own business is furthered, then the courts should not strike down the decision of management and reasonable business men in order to substitute that of their own—particularly when the decisions to hold and attend conventions have been accepted for thirty years or more by a nationwide industry as a valuable method of promoting their business, instructing their agents, and assuring better service for policy holders.[10]

The suggestion that an employer's good faith demands may be disregarded in determining whether an expendtiure incurred by an employee in direct response to those demands is an ordinary and necessary business expense has tremendous ramifications. This general question, and the more particular application thereof with respect to compelled attendance at company conventions, should be resolved now by this Court.

III.

The expenditures attributable to Irma M. Rudolph are ordinary and necessary business expenses for the same reasons that the expenditures attributable to her husband are properly so classified. It is recognized that a wife's expenses on a business trip are deductible if her presence has a bona

[10] See Appendix E. The tax treatment accorded the agents is very material to the Company's objective in sponsoring the convention. The Company has concluded, over long years of experience, that its conventions serve an important business purpose, and neither the Company nor the agents consider the conventions to be a vacation. The Company has already heard expressions of discontent that if the agents are to be charged with income and allowed no corresponding deduction for attending a business convention, they would rather take a real vacation of their own choosing, instead of paying a tax penalty for attending a convention at the Company's behest. In other words, the business purpose of the Company will be seriously impaired by the imposition upon the agents of a tax based upon conclusions of fact contrary to the expressed intent of both the Company and the agents. This would seem an unwarranted erosion of business prerogative.

fide business purpose, see *U. S. Treas. Reg. 1.162-2(c)(1954)*, and this determination must be made in light of all the facts bearing upon her presence. It is evident from the testimony before the Court (R. 61), that the Company makes a conscientious and sustained effort to bring the agents' wives into the Company family, and to advise them in a practical manner about the ways they may help their husbands. The Company's efforts in this behalf were not casual and offhand, but were deliberate and carefully considered to achieve their purpose. This has been true on an industrywide basis for years antedating the advent of high taxes![11] The Company expected C. J. D. Rudolph's wife to attend, and this expectation was not taken lightly by him or the other agents.

If an employee's wife attends a business convention under the guise of a business purpose when in reality the trip is personal, her expenses should not be deductible. But where the Company commands that a wife attend, not for the purpose of offering disguised compensation but for its own legitimate business reasons, and the employee acts in response to that command, the wife's expenses are and should be deductible as ordinary and necessary business expenses.[12]

[11] See Appendix E, page 78.

[12] See Remarks by Joseph E. Tansill, 14 Journal of Taxation 201, 202.

"Expenses of wives of employees paid by the employer, in attending conventions, * * * seem to constitute another area of spotty enforcement when various parts of the country are contrasted with each other. There are variations among agents in the same district, of course, so that complete uniformity does not exist, but in general it appears that the Middle West has been more vigorous than some other areas on the question of the expense account problems, including wives expenses. *Litigation may ultimately be required to settle these questions*, where the wife's presence is a 'command performance' * * * or where the wife does in fact perform an important function. * * * Modern corporate philosophy regards a key employee's wife as an indispensible member of the team, and many a promising career has been blocked because the individual's wife doesn't measure up."

CONCLUSION

It is Petitioner's belief, based upon Respondent's failure to question the agents of other insurance companies about similar conventions, that Petitioners (and the taxpayers in the *Thomas* case) have been singled out to test Respondent's interpretation of the law. Your review and resolution of the questions presented will not only serve therefor as a greatly needed and lasting guidepost to business in determining the tax effect of its customary actions upon its employees, but will stem in advance the unnecessary flood-tide of litigation which is certain to result from the decisions of the Court of Appeals.[13] If the questions herein presented are not now resolved by this Court, Respondent will doubtless assess deficiencies against untold numbers of taxpayers throughout the United States based upon the decision of the Court of Appeals. For these and the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

FELIX ATWOOD,

RICHARD A. FRELING,
1900 Mercantile Dallas
Building,
Dallas 1, Texas,
Attorneys for Petitioners.

[13]The response to attack on the legitimacy of business conventions has been vigorous. See, *e.g.*, Appendix E, pages 82 and 83.

AFFIDAVIT OF SERVICE

STATE OF TEXAS }
COUNTY OF DALLAS }

I, FELIX ATWOOD, counsel for Petitioners, do hereby certify that service of four copies of the foregoing Petition for Writ of Certiorari has been made on Respondent by mail in accordance with Rule 33 of the Rules of this Court.

Dated this day of ~~August~~ September, 1961.

FELIX ATWOOD,
Attorney for Petitioners.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF DALLAS
DALLAS DIVISION

Civil Action No. 8317

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

OPINION OF THE COURT

DAVIDSON, District Judge: This is an action by the plaintiffs to recover $126.90 in income taxes and $10.19 of interest, together with interest on such sum. Plaintiffs were assessed and paid such amount and bring this suit to recover the payment so made.

The deficiency in such amount was assessed on the theory that the $560.00 admitted value of an all expense paid trip from Dallas, Texas to New York City, taken by the plaintiffs, husband and wife, in 1956, and paid for by the Southland Life Insurance Company, was includible in the income of the plaintiffs, and as a personal expense was not deductible by them as an ordinary and necessary business expense. Plaintiffs contend that the value of such trip was not income to them, and even if it were, that they are entitled to deduct its value as an ordinary and necessary business expense. Plaintiff, C. J. D. Rudolph is an insurance agent selling for Southland. He qualified to attend

Southland's convention in New York City and also to take his wife along by virtue of selling the requisite amount of insurance as determined by Southland. The convention trip consumed five or six days. Of this time, one morning session was devoted to a business meeting, followed by a business luncheon. The remaining time was devoted to travel, sightseeing, entertainment, fellowship or free time.

There are certain well settled propositions of law we might gather our thoughts and reasons from. One is that a bonus paid to an employee is part of his income, just like a tip paid to a waitress is part of her income.

It is likewise a settled proposition of law that an employer may assemble his employees for the purpose of training and instructing them, and the expenses that he goes to or to reimburse them for the expense they went to in coming to the meeting is a legitimate expense of the company, and no gain to the employee in a monetary way.

Now the reasoning from these two propositions—let us see what is true here.

The recent Alabama case, *Thomas v. Patterson*, a November 1959 decision of the United States District Court for the Northern District of Alabama, was for attending a convention at Fort Monroe in Virginia. It does not appear where the office of the company is—the insurance company—it does not appear where the territory of the company is. So far as the information is concerned, much of its business might be around and about Fort Monroe. Therefore, selection of that place would be in line with ordinary business economy.

In any event, we are concerned with whether plaintiffs in this case must include the value of the tr in their income and if so, whether or not they are entitled to a business expense deduction. We are not concerned with the deductibility of the convention's cost by the insurance company. It is the purpose of the convention to the taxpayers which govern our action, not the purpose of the insurance company in holding them.

We will assume that the company here has a larger part of its business in Texas and adjoining states. Primarily, the place of the home office would be the place where the agents would be called to as a *business* proposition to receive instruction and to be taught.

Suppose there was a lot of business down and around San Antonio. To break the monotony to a degree, the convention might be held in San Antonio, or in Houston, or might be held in Oklahoma City. But what business reason is there for holding a convention in a place as far away as New York; and certainly, what business reason is there for holding a convention in Havana, Cuba. It was not held down there for educational purposes in insurance.

Assume that it was to a degree; what was the primary purpose of the trip? It was a reward, or a bonus given to the employees for excellence in service. If it was purely educational, it might be held here in Dallas and those who did not attain such a high rating might have the benefit of the program at the convention.

All of the evidence considered, we think it irrefutably leads to this conclusion: That the insurance company was just doing a gracious, magnanimous thing of awarding those leading agents a trip just as much as if it had awarded them an automobile, or suit of clothes; similarly the plaintiff and the other leading agents of Southland were awarded this trip to New York, and the trip to New York cost Southland $80,000.

The Court's conclusion is that the holding of these conventions generally, and especially the holding of them at remote places, have the primary purpose of affording a pleasure trip which the agent himself, to enjoy, would have paid out of his own funds if the company had not given it to him, which is in every way in the nature of a reward that would be a bonus.

Suppose they had offered it to a man in this manner: At the first of a given period, let's say the first of the year, to all those that write over $100,000 insurance, let's say, we will either give you a free trip to Paris, France, or we will give you a bonus of $500. You can exercise your choice; either one would have been a bonus. The trip would have been a bonus. The primary purpose of it was not to educate insurance men in Paris; the primary purpose of it was to hold out an alluring reward to make them work harder. It was part of their service.

Therefore, we conclude, that the trip was earned by the plaintiff, C. J. D. RUDOLPH, and was in the nature of a bonus, reward, and compensation for a job well done. As

compensation, the $560.00 value of the trip of the husband and wife was properly included in the income of plaintiffs for the year 1956.

Further, since the trip was primarily a pleasure trip in the nature of a vacation, its cost is personal to the husband and wife and therefore not deductible by them,

Recovery for the plaintiffs will be denied for the reasons above stated.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18788

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Appellants

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(June 27, 1961.)

Before JONES and BROWN, Circuit Judges, and DeVANE, District Judge.

PER CURIAM: The facts are set forth in the opinion of the district court. *Rudolph v. United States*, 189 F. Supp. 2. The applicable law is to be found in *Patterson v. Thomas*, F. 2d , decided by this Court on March 16, 1961.

No factual differences call for the application of a different rule or the reaching of a different result than in *Patterson v. Thomas*. The judgment of the district court is

AFFIRMED.

BROWN, Circuit Judge, Dissenting:

To what was urged by my dissent in *Patterson v. Thomas*, 5 Cir., 1961, F. 2d at [No. 18263, March 16, 1961]. I would add brief comments on a few matters bearing emphasis in this record.

The notion that this was one big happy company-paid-for-holiday in New York City where a formal session for the first half day was a mere tip-of-the-hat to give appearances of a working trip is simply unfounded. Mr. Rudolph, the Taxpayer, and his wife—a companion, co-worker, partner-in-fact in the business of life insurance business as well as fellow Taxpayer—had nothing to do with selecting the time, the place, or the program. All was planned, precisely as to moment, locality, event and eligible participants. Moreover, it was not, as the Government seeks to make it appear, a long trek for a half of a day's formal business activity. Those selected by Southland Life Insurance Company were required to travel together. This group of 293[1] made up of 151 men and 142 wives drawn from the South and Southwest were compelled to come to Dallas where they became passengers on "two convention special trains." The

[1]The breakdown was as follows: agents 102, wives 97; salaried field assistants 3, wives 3; assistant managers 2, wives 2; managers 17, wives 17; officers 27, wives 23.

trains departed on Tuesday, December 11. Nearly 48 hours later and about 3:00 p.m. Thursday, December 13, the trains were to arrive at Jersey City, New Jersey, where special chartered buses took the travelers to the Waldorf-Astoria. On Sunday morning similar buses took all from the hotel to the trains for the return trip by the convention special trains arriving back in Dallas some time on Tuesday, December 18.

It is not, therefore, a case of employees getting together for the half-day's session on Friday, December 14, with all remaining time free. Out of the approximately 149 hours from Tuesday, December 11, to Tuesday, December 18, in the neighborhood of 96½ of them were spent in enforced togetherness. It is neither an exaggeration nor does it require more than an amateur license as a lyrist to contemplate that with the rhythmic clickety-clack of the wheels as this train made its way to and from New York City and Dallas, each recipient was reminded of the company message in a syncopated way. And a part of that message was that the company intended that all who were asked to attend would do so. Of course in the psychological complex of a sales business this point was not made crudely. Where in *Thomas* management phrased it as "frowning" on any who declined the trip, Southland has euphemisms of equal portent. Its agency vice president, after stating that an agent indicating he would not attend was required to give an explanation, testified that "if he [the agent] doesn't have a proper reason it would be looked upon with serious displeasure."

This convention trip was meant for the agent's own good. Of course that was equated with the company's good for it was wise psychologically and ethically legitimate to conclude that what was good for the agents was good for Southland. The emphasis was not really the pointed one of increasing sales. That, and the company's benefit, was to come primarily from reassuring the agents that things were not really as bad as they seemed. High officials testified without contradiction that in the life insurance sales business where there are so many "turndowns" by prospects, it is essential to buoy up the spirits of these solicitors. This, experience proves is best accomplished through the constant, close association on an informal semi-social basis of many successful salesmen who have weathered and overcome similar discouragements.

The insidious purpose—here used with no moral overtones of disparagement—of the company's theme on the minds and wills of its captive audience, was exemplified in the most intense fashion by the Friday luncheon at the Hotel Waldorf-Astoria which ostensibly had no specific relation to selling life insurance. One of the nation's outstanding ministers and public speakers, renowned for his syndicated writings, television and radio appearances, was the luncheon speaker. But even this was not left to chance. The company, by letter, outlined to him the nature of the meeting and suggested that the talk be "of an inspirational nature, along the lines of achievement, success and happi-

ness that can be obtained through proper attitudes of faith and practices of the well-ordered personal life." After discussing the nature of a life insurance agent's work and the essential motivation of genuine service to his clients, management's estimate of the importance of these things was stamped by this conclusion in the letter. "Therefore, the degree of success and satisfaction obtained from his work depends not just entirely upon his knowledge of life insurance, but to a very large degree depends upon his attitudes toward his opportunities and his zeal to excel." It is not surprising that the agency vice president testified of this speech that this speaker "did a better job than I had hoped he would" and that the speaker "did mention something specifically about the work of an insurance man * * *" and "he knew more about it than I did."

Unlike *Thomas* which concentrated on the practice followed by that particular life insurance company, this record contains the uncontradicted testimony of the Managing Director of the Life Insurance Agency Management Association. This is an industry-supported organization interested in research, management consultation, education and training, and publications in the life insurance business. From his 30-years' experience in life insurance from the management point of view, this witness outlined why management would consider it good business to spend $84,000, as was done here, on such a convention for its leading agents. He emphasized the importance of personal contact in an informal setting among those who either were top flight

producers or had shown promise. This included the opportunities for intimate associations with high level executives under circumstances which afforded ample time free from the diversion of workaday problems were such meetings undertaken in home office surroundings during working hours.

Indeed, as in *Thomas*, the Government does not question this. It acknowledges, as it must, that this is a legitimate expenditure by the employing life insurance company. But it is precisely at this point that the whole matter reaches its climax: if an event is of such importance in management's eyes, it is certainly not something which the company considers the agent may accept or decline on a take-it-or-leave-it basis. In other words, what the company does for the agents' (and its) good is known by both to be important and expensive. What is tendered must be accepted unless there is a real good excuse. This record, therefore, reiterates with emphasis the actual, psychological, economic pressure of compulsion under which the agent (and his wife) are coerced into taking what is offered.

The future economic livelihood of an agent under a contract granting the employer the right of termination at will is the thing at stake. To take a trip to preserve that security is something not done primarily for personal enjoyment when the employee *must* take the income, *pay* tax on it, *spend* it precisely as *directed* by the *donor* and then treat it as though this were an ordinary personal junket of a family on a holiday. In a real and vital sense the money is

spent for business and business reasons only. It is indispensable. What is indispensable is certainly ordinary and necessary.[2]

In the realistic formula of "ordinary and necessary," life insurance agents under such compulsion should have like treatment accorded to others. Deductions have been allowed as "ordinary and necessary" to clergymen attending a church convention;[3] to expenses of an employee attending conventions of a related business group;[4] to a lawyer attending a meeting of the American Bar Association;[5] to a legal secretary attending the national convention of the National Association;[6] to physicians attending medical conventions;[7] to certified public accountants attending con-

[2]Both on this underlying issue and the subsidiary one of allocation and apportionment the relative cost to be able to attend the formal business sessions in relation to the total $560 attributed income, is substantial either on the basis of the husband alone or husband and wife together. In other words it cost Taxpayer alone a minimum of $215.41 to be able to attend the half-day sessions in New York. These facts are not disputed:

Expense	*Cost per person*	*Cost per couple*
Meals in New York		
1 breakfast	$ 2.00	$ 4.00
1 luncheon at Waldorf	6.00	12.00
Round trip train fare	119.40	238.80
Pullman cost	37.13	74.26
Rail meals	30.54	16.46
Baggage, porter & dining car tips	8.23	16.46
Hotel New York (1 day) (approximately ⅓ on basis 3 days actual cost)	12.11	24.22
	$215.41	$430.82

[3]Marion D. Shutter, 2 B. T. A. 23.

[4]Ratterman et al., 7 T. C. M. 476, affirmed without opinion, 6 Cir., 1949, 177 F. 2d 204.

[5]Ellis v. Burnet, D. C. Cir., 1931, 50 F. 2d 343.

[6]Rita M. Callinan, 12 T. C. M. 170.

[7]Robert C. Coffey, 1931, 21 B. T. A. 1242; Wolfe v. McCaughn, E. D. Pa., 1933, 17 A. F. T. R. 1007; Ray Upham, 1929, 16 B. T. A. 950; J. Bentley Squier, 1928, 13 B. T. A. 1223; Cecil M. Jack, 1928, 13 B. T. A. 726.

ventions;[8] to university teachers in attending conventions or scientific meetings;[9] to professional cartoonists attending political conventions;[10] to persons attending the Red Cross Convention;[11] to school teachers attending summer school;[12] to attorneys attending an institute on Federal taxation;[13] to employees sent to refresher courses to become more acquainted with new processes in the industry;[14] to a furniture store sending its buyers to the annual furniture mart;[15] to representatives to annual conventions of trade associations;[16] and to an insurance agent away from home on business.[17]

This Court recently held in *Williams v. Patterson*, 5 Cir., 1961, 286 F. 2d 333, that expenditures made by a railroad conductor on his layover period of six hours were deductible even though all of the activities could narrowly be classified as "personal activities." In doing so we said: "although most of these factors in a narrow sense affect the personal convenience of the traveler, the motivation for sleep and rest arises from the exigencies of the employment, the business demands of the employer, the relation of the employee to his employer. * * *" Then we concluded the correct rule to be that expenditures made "in order to meet the exigencies of his employment or the business demands

[8]Charles O. Gunther, Jr., 54,287 P-H Memo T. C.
[9]Alexander Silverman, 6 B. T. A. 1328.
[10]Jan N. Darling, 4 B. T. A. 499.
[11]Henry Cartan, 30 T. C. 308.
[12]Hill v. Commissioner, 4 Cir., 1950, 181 F. 2d 906.
[13]Coughlin v. Commissioner, 2 Cir., 1953, 203 F. 2d 307.
[14]Pacific Grape Products Co. v. Commissioner, 17 T. C. 1097 (reversed on other points, 9 Cir., 1955, 219 F. 2d 862).
[15]Finkenburg's Sons, Inc., 1952, 17 T. C. 973.
[16]I. T. 2602, 1931 Cum. Bull. 130.
[17]Summerour v. Allen, M. D. Ga., 1951, 99 F. Supp. 318.

of his employment" are properly deductible. 286 F. 2d 333 at 339-40.

The contemporary interest in possible legislation changes suggests that perhaps the understandable, realistic "ordinary and necessary" formula produces results unsatisfactory to the revenue, undesirable from a socio-economic point of view or impossible of orderly administration. That may be so but the remedy is for Congress. Until then we have to view the formula in the light of the facts. Here, in my judgment, these facts show an honest, legitimate, ethical expense. More than that these facts compel a finding of absolute business compulsion when viewed from the standpoint of the agent's economic security.

I therefore dissent.

JUDGMENT

Extracts from the Minutes

of June 27, 1961.

C. J. D. Rudolph and Irma M. Rudolph,

No. 18,788

versus

United States of America

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Brown, Circuit Judge, Dissenting

APPENDIX C

Filed
28th day of July, 1961

/s/ Edward W. Wadsworth, Clerk of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,788

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(July 28, 1961)

ON PETITION FOR REHEARING

Before Jones and Brown, Circuit Judges, and DeVane, District Judge.

Per Curiam

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is, hereby DENIED.

Brown, Circuit Judge, Dissenting.

APPENDIX D

In the
United States Court of Appeals
for the Fifth Circuit

No. 18,263

GEORGE D. PATTERSON, Director of Internal Revenue,
Appellant,

versus

J. C. THOMAS AND MARTHA THOMAS,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(March 16, 1961

Before RIVES, BROWN and WISDOM, Circuit Judges.

RIVES, Circuit Judge: The District Director appeals from a determination by the district court[1] [59-2 USTC ¶9734] that amounts paid by the taxpayer's employer to a hotel and a travel agency for accommodations, meals, and a sight seeing trip for the taxpayer and his wife did not constitute gross income to the taxpayer; or, if they did, then such amounts, together with expenditures for which the taxpayer was reimbursed by his employer, were deductible by the taxpayer as ordinary and necessary business expenses.

[1]The findings of fact and conclusions of law of the district court are not officially reported.

The taxpayer, J. C. Thomas, was employed during the relevant period as a field representative of the Liberty National Life Insurance Company. By meeting certain standards, the taxpayer qualified to attend and bring his wife to the Company's annual Torch Club convention,[2] which in 1956 was held at the Hotel Chamberlain, Old Point Comfort, Fort Monroe, Virginia.

To attend this meeting, the taxpayer and his wife departed from Birmingham on May 14, 1956, spent two nights en route at a place of public lodging, and arrived at the Hotel Chamberlain on May 16. Their return trip commenced on May 20. They spent one night at a public lodging en route to Birmingham, and reached home on May 21. The taxpayer and his wife traveled in their own automobile. Prior to his departure from Birmingham, the taxpayer received from his employer a check for $168.16, which was spent for transportation, meals and lodging to and from the Hotel Chamberlain.

The Company paid directly to the Hotel Chamberlain $103.40 for lodging and meals for the taxpayer and his wife at the hotel while attending the meeting. The Company also paid directly to a travel agency the sum of $12.92, representing the expenses of a sight-seekin trip to Williamsburg, Virginia, for the taxpayer and his wife. The aggregate expenses totaled $284.48. There is no question in this case as to the reasonableness of the amount of these expenses.

The Torch Club originated in 1931 and was composed each year of outstanding field representatives of the Company who

[2]The requirements for membership in the Torch Club are "based upon sales of new business and the conservation of old business."

had during the preceding year met certain established goals. The Company "required" those employees who were invited, and their wives, to attend the annual meeting of the Torch Club. Employees who qualified for the convention, but who failed to attend for any reason, did not receive any money or other thing of value from the Company in lieu of such attendance.

Those present at the Torch Club convention were expected to adhere to the scheduled program. The taxpayer and his wife participated in substantially all of the scheduled activities.[2] The taxpayer had no control over the program, the time, or the place of the meeting.

The schedule of activities at the Torch Club convention was as follows:

Wednesday, May 16:
1:30 Arrival.
1:30-5:00 "Renewing old acquaintances and making new acquaintances."
6:30 Company dinner and water show.

Thursday, May 17:
7:00-9:30 Breakfast with delegates.
10:00 Meeting (2½ hours).
Afternoon—No planned activity (Taxpayer played golf).
8:30 Movie.

Friday, May 18:
7:00-8:30 Breakfast with delegates.
9:00 Tour of Williamsburg and Jamestown.
8:30 Bingo.

[2]Taxpayer and his wife did not go to the motion picture scheduled for the evening of Thursday, May 17, as they had previously seen it. Nor did they stay "the whole time" at the water show held on Wednesday evening.

Saturday, May 19:
7:00-9:30 Breakfast with delegates.
10:00 Meeting (2½ hours).
Afternoon Boat Trip.
7:00 President's Banquet and Ball.

The appellants' position is that this trip to the Hotel Chamberlain constituted the prize in what, in substance, was an annual sales contest.[4] The taxpayer seeks escape from this determination along two routes.

Initially, the taxpayer argues that his employer's payments to him and to the Hotel and travel agency for his benefit did not constitute gross income to him. For purposes of determining whether these sums were income, we may treat the amounts paid directly to the Hotel and travel agency and the traveling expenses for which the taxpayer was reimbursed in the same manner. In both situations the taxpayer ultimately received only non-cash goods or services, paid for by his employer. Taxpayer claims these sums come within the rule of *Corliss v. Bowers*, 281 U. S. 376 (1930), and are not income to him since he had no "command" over them and was not free to expend them in any manner he saw fit. It has been established beyond question, however, that receipt by a taxpayer of benefits in a form other than cash may constitute income to him.[5] Appellee next argues that the $168.16

[4] In his welcoming speech, the President of Liberty National noted that the Company "officially abandoned all company-wide contests a few years ago." He went on to add that, "The only company-wide contest we have left, if it can be called a contest, is the Torch Club, and I do not classify that as a contest, for no one is forced to make it and no one is criticized if he fails to do so."

Gross income includes amounts received as prizes and awards. Section 71, Internal Revenue Code of 1954.

[5] See Section 61, Internal Revenue Code of 1954; Treasury Regulations §§ 1.61-2(d)(1), 2(d)(3). See also *Commissioner v. Glenshaw Glass Co.*, 1955, 348 U. S. 426, 432; *Commissioner v. LoBue*, 1956, 351 U. S. 243, 246.

advanced to him for traveling expenses and the sums paid directly to the Hotel and travel agency did not constitute gross income to him because they were expended for the "convenience of his employer." Taxpayer cites in support of this theory, Regulation 111, Section 20.22(a)(3) of the 1939 Code, which reads, in part, as follows:

> "If * * * living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be added to the compensation otherwise received."

It is clear from the words of the regulation itself and the cases relied on by appellee[6] that the "convenience of the employer" rule there referred to applies only to meals and lodging and does not exclude amounts paid to the taxpayer which he expended for gasoline, sight-seeing trips, etc. from the Code's broad definition of income. The fatal blow to taxpayer's position, however, is delivered by Section 119 of the 1954 Code, which enacts the "convenience of the employer" rule into law, but in a modified form. Under that Section, meals and lodging furnished by employers to employees are excluded from the gross income of the employees "only if

> (1) in the case of meals, the meals are furnished on the business premises of the employer, or
>
> (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment."

This Section is inapplicable to the sums in issue which were spent for meals and lodging enroute to and at the Hotel Chamberlain.

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[6] *E.g., Diamond v. Sturr, 2d Cir., 1955, 211 F. 2d 264* (reviewing history of the "convenience of the employer" rule); *Boykin v. Commissioner, 8th Cir., 1958, 280 F. 2d 249.*

Since the payments received by the taxpayer and his wife from his employer and the noncash goods and services received by the taxpayer and his wife as a result of payments by his employer were includible in the taxpayers' gross income, we must decide whether these amounts were deductible by the taxpayer as ordinary and necessary business expenses within the meaning of Section 162 of the Internal Revenue Code of 1954.

Treasury Regulations 1.162-2 (I. R. C. 1954) provide in part:

> "(b)(1) If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible."

Both parties agree that the crucial determination is whether the primary purpose of the trip was business or pleasure.

At the outset, it is important to note that the nature of the trip must be determined from the individual taxpayer's point of view, rather than from the viewpoint of his employer. To illustrate, an employer may find that the efficiency of his salesmen is greatly increased if he gives them a two-week, all-expense-paid vacation trip to Florida as a reward for increasing sales. From the employer's point of view, the

amounts he expends in providing the trip may be business expenses deductible by him.[7] But to the recipient, that trip is solely for pleasure. Although "connected with" his business, the salesman who goes on the Florida jaunt is receiving income, just as if the prize in the sales contest were a bonus, and the amounts expended in going to Florida and spending the two weeks there would be nondeductible personal expenditure. We note, therefore, that the deductibility of sums as business expenses by an employer is immaterial in determining whether the expenditure of those sums by their recipient is deductible by him as an ordinary or necessary business expense.

In determining whether the taxpayer's trip here under consideration was primarily for business or primarily for pleasure, we consider the following:

1. "*The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business* * * *."[8] The schedule of activities at Old Point Comfort reveals that, at the most, five hours out of the three and one-half days were spent in formal business meetings. The first of the two meetings consisted mainly of welcoming speeches, and a review by the President of the past year's activity of the Company, the latter being subsequently reprinted for general distribution. At the second meeting, two speakers did talk on subjects of an educational nature. But more time was spent on the sight-seeing tour alone than at both of these "business" meetings. In answer to this point,

[7] Expenses of this type would apparently not be deductible by a life insurance company. Section 803, I. R. C. of 1954.

[8] Treasury Regulations 1.162-2(b)(2).

the taxpayer forcefully argues that, although the schedule reveals much activity of a purely recreational nature, he sought as co-participants in those activities company officials and better salesmen than himself, who might, while "playing," provide him with information on improving his abilities. He testified that much of the conversation on the sight-seeing tour, the boat trip, and his golf game directly concerned his business. Were these the only facts on which the court had to base its judgment, the proper resolution of the issues in this case would be more difficult than we believe they are. We do think, however, that the low proportion of time spent in formal business meetings distinguishes cases such as *Coughlin v. Commissioner*, 2d Cir., 1953, 203 F. 2d 307, where the taxpayer, an attorney, was allowed to deduct the expenses of tuition, travel, board and lodging incurred in attending a federal tax institute at New York University.

2. *The convention was sponsored by the taxpayer's employer and its only participants were taxpayer's co-employees.* Taxpayer seeks to rely on cases such as *Alexander Silverman*, 6 B. T. A. 1328 (1927), which allowed a university professor to deduct the expenses of attending a scientific convention. In none of those cases, however, was the convention sponsored solely by the taxpayer's employer. This fact, we think, is some, though not conclusive, evidence that the convention was really a form of remuneration.

3. *The convention was held at a resort hotel.* The taxpayer argues that the number of people attending the convention was large, and that a location had to be found where all the conventioneers could be housed together. Although the evidence

is by no means conclusive on the point, it may well be that no hotel located closer to the home of the convention participants was capable of handling a group of that size.[9] But, the fact remains, the convention was at a resort hotel.[10]

4. *The attitude of the Company.* The Company looked on the trip as one primarily devoted to pleasure and sought to convey this impression to the participants. In making arrangement for the trip, a vice-president of the Company wrote to the Manager of the Hotel Chamberlain, that: "While we hold two business meetings during our four-day convention, business is secondary. The main object is to give our people a good time. Specifically, I would be interested in knowing the fishing accommodations." The next paragraph of that letter reads:

> "One thing that interests us about Old Point Comfort is the proximity to Williamsburg and other famous historical places. I would like to get some information relative to sight-seeing trips for the entire group. Another question I would like to clear up is relative to the weather during the month of May. Is it warm enough for outdoor activties or not?"

The vice-president's wife sent a letter to the wives of qualifying employees, in which she noted that:

> "The Virginia Peninsula has everything to offer for a vacation convention. It is the sightseer's paradise. One

[9]But see, *Rudolph v. United States, Civil No. 8317, N. D. Texas, 1960.*

In his welcoming speech, the President of Liberty National noted that: "This is an unusual meeting since it is being held here in Virginia, a state in which we do not operate * * * but it was felt that everyone would enjoy a trip to this historic part of the country."

[10]Among the facilities available to the conventioneers were: shuffleboard; horseshoes; ping-pong; billiards; pool; a heated outdoor, salt water swimming pool; a picnic area; and a television theater. In addition, the hotel was situated in "the center of historic Vriginia" with numerous spots for sight-seeing enthusiasts.

> whole day of the Convention will be devoted to a tour of Jamestown and Williamsburg, with a stop at the battlefield at Yorktown, where the surrender of Cornwallis to George Washington ended the Revolutionary War. There is so much to be seen!"

The letter concluded: "I hope you will have as much fun as we have had in planning this vacation for you." With reference to the employees, there was testimony that, "they consider it a reward. I hope they do. We have been trying to sell them on it for a long time."

We think that the foregoing factors establish that the primary purpose of the trip to the Hotel Chamberlain was pleasure.

Whether an expenditure is ordinary and necessary to a taxpayer's trade or business is usually a question of fact.[11] And "Where the trial has been by a judge, without a jury, the judge's findings must stand unless 'clearly erroneous.' Fed. Rules Civ. Proc., 52(a). 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 1948, 333 U. S. 364, 395."[12]

We are convinced that the findings of the trial court, to the effect that the payments in this case were not properly includible within the taxpayer's gross income, and that if so includible, they were deductible as ordinary and necessary business expenditures, are mistaken and thus clearly erroneous within the meaning of Rule 52(a), F. R. C. P.

[11] *Commissioner v. Heininger, 1943, 320 U. S. 467.*
[12] *Commissioner v. Duberstein, 1960, 363 U. S. 278, 291.*

The taxpayer will be allowed a pro rata deduction for the amount of time spent at the business meetings, but no deduction will be allowed for his travel expenses.[13]

It follows, as a matter of course, that deductions claimed by the taxpayer's wife will be denied *in toto*, since her presence at the business meetings which taxpayer attended had no bona fide business purpose from the viewpoint of the taxpayer.[14]

The judgment of the district court is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

[*Dissenting Opinion*]

BROWN, Circuit Judge, dissenting: I certainly concur that the amounts involved constituted income to the Taxpayers. The question is whether the amounts spent were "ordinary and necessary expenses paid * * * in carrying on any trade or business," §162(a), or ordinary and necessary "traveling expenses * * * while away from home in the pursuit of a trade or business," §162(a)(2).[15]

I am also in agreement that we are here concerned with Mr. and Mrs. Thomas as the Taxpayers. We must therefore view it from their standpoint. Deductibility to either of them

[13]Treasury Regulations 1.162-2(b)(1), quoted supra.

[14]Treasury Regulations 1.162-2(c).

[15]26 USCA § 162(a): "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including.

"(1) * * *

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *."

is distinct from the deductibility to "their" employer, Liberty National Life Insurance Company. I would not, however, go so far, as does the Court, to say that the deductibility status to the employer-corporation of the payments made by it "* * * is immaterial in determining whether the expenditure of these sums by their recipient is deductible by him * * *." For reasons which I undertake to develop the considerations making expenditures "ordinary and necessary" to the employer may be part and parcel of a business situation making the spending of such sums equally ordinary and necessary as to the recipient employee. In other words, the one is a factor influencing the other.

But I differ fundamentally as to the denial of full deduction to the husband for all of his expenses. The position of Mrs. Thomas is not so clear, but as to her also I think the expenses were deductible without proration.

I say fundamentally because deductibility depends on the statute, and not on what this or that particular court decision happened to hold. Consequently, I would not urge that our decision here is contrary to the cases pressed by Taxpayers.[16] These are but two isolated opinions in what has been described by one Court as a "formidable array of authorities."[17] A leading text more accurately calls it "a plethora of authorities"[18] especially in view of the aptness of the medical connotation that this is "a morbid condition characterized by an excess of blood in the body" of the law.

[16] *Coughlin v. Commissioner*, 2 Cir., 1953, 203 F. 2d 307; *Alexander Silverman* (1927), 6 B. T. A. 1328, discussed by the Court ___ F. 2d ___.

[17] *A. Giurlani & Brother v. Commissioner*, 9 Cir., 1941, 119 F. 2d 852, 855.

[18] 4 Merten's, Law of Federal Income Taxation § 25.01 at 5. Under 136 subheadings covering 390 pages of text, thousands of cases are listed in hundreds of footnotes.

A constant recurrence to the words of the statute "ordinary and necessary" in the light of general principles distilled from the mass of material will, in my judgment, put quite a different turn on the activities of these Taxpayers. A brief resume shows, I think, two things: First, the Court disregards these factors; and, second, it operates as a fact-finder to reach factual inferences contrary to those of the District Judge who saw and heard all of these witnesses.

To begin with the standard of "ordinary and necessary" concerns whom? The test is not what the Commissioner thinks ought to be necessary or ordinary, or what a court, or its judges, might consider proper. Fortunately for our economy, none of these has the responsibility for running the particular business—personal or corporate—whose income is so essential as a subject of taxation. The test is in terms of the specific taxpayer. It seeks to measure whether, as to him, the questioned expenditures are substantially related to his business venture whose object is making money.

We encounter no difficulty in this record in relating Taxpayer's usual activity to a "trade or business." As to this element Taxpayer's employment fits the simple test that "Every person who works for compensation is engaged in the business of earning his pay * * *."[19] And it is without dispute that as a field representative of this insurance company he had long conducted "the enterprise in good faith with an intention of making a profit * * *" and "of producing income"[20] for himself. Whether the expenditures in question are deduc-

[19]Id. § 25.08 at 20.
[20]Id. § 25.08 at 21.

tible turns on whether they were "ordinary and necessary." As to these statutory words "it has been said that" these "mean those expenses which economically are an integral part of a business * * *."[21] An expenditure "will ordinarily be considered 'necessary' if the expenditure is appropriate and helpful in developing and maintaining the taxpayer's business * * *."[22] Quite obviously, "the necessity involved is not absolute or inexorable."[23] Proceeding on the assumption that "a taxpayer will not incur an expenditure unless required or justified by the needs of the business," the "courts are slow to override the taxpayer's judgment as to the necessity for incurring the expenditure."[24]

This brings us to the companion term "ordinary" since the expenditure must be both necessary and ordinary. As we are dealing with an "ordinary" expense in the business community "Customs and practices * * * and form of speech prevailing in the business world of the taxpayer will usually furnish reliable guides * * *."[25] One thing is clear, the "concept of 'ordinary' * * * does not require that the expenditures be either habitual or normal in the sense that the taxpayer either makes or is required to make them often; the expenditure may be 'ordinary' even though unique or nonrecurring to the taxpayer affected."[26] Quite obviously, "the nature and

[21] Id. § 25.09 at 24, citing *Commissioner v. Doyle, 7 Cir., 1956, 231 F. 2d 635, 637*, that "integrality is the test."

[22] 4 Merten's § 25.09 at 24.

[23] Id. § 25.09 at 24-25.

[24] Id. § 25.09 at 25.

[25] Id. § 25.09 at 26.

[26] Id. § 25.09 at 27 and note 76.2: "An expense may be ordinary though it happen but once in the taxpayer's lifetime. *Deputy v. duPont, 308 U. S. 488, 84 L. Ed. 416, 60 S. Ct. 363 (1940); Campbell v. Fields, 229 F. 2d 197 (C. A. 5th, 1956).*"

scope of the taxpayer's business constitutes a factor of considerable importance."[27] For it "to be 'ordinary and necessary', the expediture must have some reasonably proximate relation to the customary conduct of the taxpayer's business."[28] After pointing out that the decisive distinctions are those of degree and not of kind for which there is no "verbal formula that will supply a ready touchstone" the Supreme Court has made a remarkable pronouncement. It is remarkable because it takes into account in vivid fashion that the statutory term "ordinary and necessary" is to be judged against the habits and customs of American businessmen whether those on the sidelines would consider them prudent or imprudent, wise or unwise. The Court states the statutory standard:

> "* * * is not a rule of law: it is rather a way of life. Life in all its fullness must supply the answer to the riddle."[29]

An eminent text sums it up this way.

> "All of the foregoing criteria and principles may be said to rest, at least in part, on any underlying implication. That implication is that whether an expenditure is both 'ordinary and necessary' will depend upon a determination as to whether a hard-headed businessman would have incurred it under like circumstances. That person is the so-called average hard-headed businessman and not necessarily the taxpayer himself. * * *"[30]

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[27] 4 Merten's, § 25.09 at 29.

[28] Id. § 29.09 at 31.

[29] *Welch v. Helvering, 1933, 290 U. S. 111, 115, 54 S. Ct. 8, 9, 78 L. Ed. 212, 213; id. § 25.09 at 28.*

[30] 4 Merten's, § 25.09 at 34. This Court has approved this approach. *Rittenberg v. United States, 5 Cir., 1959, 267 F. 2d 505, 508.*

How do the facts of these expenditures[31] and Mr. Thomas' business life match these principles? At the beginning is the bald fact that he had nothing to do with picking out Old Point Comfort, Fort Monroe, Virginia. One on a personal jaunt which is to be treated as a vacation normally has something to do with the selection of the place and the time. More than that, whether to go or not to go was not a matter of choice with him. He was not a free agent—unless, to play on words, he declined to go in which case he would indeed be a free agent—free of a job and free of Liberty National.

This convention had some of the earmarks of a prize. But it was more than that. It was a command appearance. Its importance is not for us to judge. That judgment was made by the employer, Liberty National. Those "invited" to the Torch Club were outstanding field representatives who had during the preceding year attained certain standards, evidenced high abilities, and made outstanding contributions to the Company. How much real freedom did one invited have to decline the bid? None at all, were he interested in his future employment or advancement.

The president of Liberty National so testified without contradiction:

> "Q. Does the company require those who qualify and are extended an invitation to attend these [Torch Club] conventions?
>
> "A. Well, we don't issue an order but in effect it is a requirement. They know good and well enough if they do not attend their chances of promotion is just nil.

[31]The amounts paid directly by the employer and those reimbursed to Thomas by the Company's advance are all attributed as income. Consequently, the questions in issue are the same as though the amounts were paid out of his pocket with no right of reimbursement.

"Q. Does the company expect the wives of the agents to attend?

"A. Yes sir."

How may this Court disregard the positive testimony that employees were required to attend? Certainly we may not do it on any inherent credibility flaws of the witness or his words. The District Judge credited this testimony and expressly found that Liberty National required these people to attend.[32] Do we mean to imply that while the president so stated, he really didn't mean it, or that there is no "proof" that the Company would have been so harsh to one who had the temerity to decline the King's command?[33] And if we presume to do so, from whence cometh our help or competence?

In the isolation of our judicial tower we are blind indeed to all that goes on in the busy dynamic world of commerce if we do not know—either generally or from what this record teaches—about the contemporary American institution of the "organization man."[34] He is more than a fictional character. He is a modern phenomenon. One weds a wife but he

[32]The Court formally found: '6. The Company requires those employees, agents, supervisors, superintendents, home office officials who are invited and their spouses to attend the annual meetings of the Torch Club. This requirement is not a condition of continued employment, but failure to attend without adequate reason is frowned upon and adversely affects his future promotion."

[33]Cf. *Ball v. Victor Adding Machine Co.*, 5 Cir., 1956, 236 F. 2d 170, 179 (dissent); Matthew 22:1-4.

[34]Nothing said is intended as a disparagement of Liberty National. Testimony of its high ranking officers shows that it is abreast with modern management practices, personnel relations, business psychology and the like. Likewise the Torch Club conventions were kept on a high plane. Unlike some others, this Company has not succumbed to the other American institution—the cocktail party—and no alcoholic beverages were served at any of its functions.

marries a corporation too. Every waking hour the company's needs, the company's business, the company's welfare is drummed into this person whose inner satisfaction are likewise finally warped into the corporate image through status symbols of job assignments, titles and prerogatives.

Is one enmeshed in this complex required to risk the decisive displeasure of his superiors by the affront of declining the great honor? Is he not to be judged by the atmosphere in which he exists? With economic consequences so awesome, is it not the risk itself—the very uncertainty of the consequences —which makes his "acceptance" of corporate hospitality a matter of sheer business necessity?

This Court would not hesitate to allow deduction in full if an employee were given a peremptory written order to attend under pain of dismissal or some other form of corporate banishment. That the compulsive pressure, or the genuine apprehension of them, are more subtlety exerted does not alter things. In either case the employee responds to the hospitality of the employer because this is essential to economic security and specifically to the retention of progressive employment.

The politicians, the moralists, the psychologists, the sociologists, the psychiatrists may all deplore what has come to pass, but this is, as the Supreme Court said, "a way of life," and it is that "life in all its fullness"—with all of its absurdities and social evils—that "must supply the answer to the riddle."

For to Mr. Thomas there really never was any riddle. He was faced with no conundrum. Once he was tapped he knew he had to go. His future was uncertain, his promotion frus-

trated, were he to exercise a choice. As with everything else at Liberty National, Old Point Comfort, the Hotel Chamberlin with its shuffleboard, horseshoes, Ping-pong, billiards, pool and picnic area were now to be the thing he wanted most. Once there, undoubtedly one would have fun. But the decision to go was compelled. It was compelled as a matter of business necessity. It is a pressure which people every day, everywhere in America now undergo. It is ordinary in all and the worst senses.

As American as Bedloe's Island, hot dogs, Grand Canyon, Rhapsody in Blue, Chatauqua, P.T.A., Golden Gate, Rose Bowl or Wagon Train is this institution of the organization man. Mr. Thomas, a victim and a beneficiary of that system, was under overpowering business compulsion to attend. To him the ancient question "to be or not to be" was resolved by the further one "to go or not to go." His productive future depended on the answer. As a good businessman with his ear to the ground, he did not have to wait until hearing the president testify in court that the "chances of promotion is just nil" to know what the answer would have to be.

Congress used two simple terms, "ordinary" and "necessary." They more than comprehend this situation.

The extent to which Mrs. Thomas, the wife, was absorbed into this corporate image serves a dual purpose. First, it shows why her attendance had a financial business purpose distinct from a holiday. Second, it is additional proof of the extent to which the daily life of the husband, the nominal

employee, was smothered by the predominate concern of what is best for the Company.

In this respect the Company was following another good American pattern that, to paraphrase an old hymn, "this is a woman's world." Women run the home. Women are the teachers, secular and religious. They are den mothers, pack mothers, tribe mothers and home room mothers. Women are the effective civic reformers. A male aspiring for high public office runs on or with his wife. And in the view of Liberty National the success of the husband-employee depends on the wife.

As with another woman this also begins at the beginning. Before an agent is hired, the District Manager must interview the applicant's wife in her home. Already the seeds of complete, unlimited, untiring, unshared loyalty are being planted.[35] She is given a booklet especially prepared for wives of prospective employees. The husband, if hired, is employed on a temporary basis for a trial period. At that time the wife receives a welcoming letter which transmits the President's message entitled "A Family Affair" which leaves little doubt that mother is in this too. After the husband passes his period of probation, the husband and wife each receive letters of notification that employment has become permanent. Again, nothing is casual or acci-

[35]The Agency Vice President testified:

"Q. If you decide to employ a man do you talk to his wife?

"A. We require that * * * our District Manager go into the home and interview the wife of every prospective agent before he is actually employed by the company. This is done to determine whether or not the man's wife would be sympathic and helpful to him in the business he is going to be in and also for him to explain to the wife the fact this is a business that has irregular hours."

dental. This letter transmits another booklet especially prepared for wives called "The Feminine Touch."[36]

But this Company does not risk another Paradise Lost so the barrage continues. The "Torch Magazine" each month, and District Manager Bulletins each week are mailed directly into the home and "in some instances the district managers mail them direct to the wives." It is no mere euphemism to regard the wife as "a partner to him in this business we are in." For in addition to this running pressure a special visit by managerial representatives is made each year in the home. In joint consultation with husband and wife the family's needs are reviewed with the Company representative and translated against required production through the use of Company prepared planning and budget forms.[37] What is wanted, what is needed, what may be had, finds common, single expression in the Company's welfare. As genuine as the employer's interest is, this is not

[36]The Agency Vice President described it:

"A. That booklet * * * we send to the wife at the time her husband becomes a permanent employee. The title of this book is 'The Feminine Touch' and it tells a wife in detail some of the things she can do and how she can assist her husband in becoming a successful life insurance man."

[37]The Agency Vice President stated:

"A. * * * We believe a man's wife is a partner to him in this business we are in. We definitely feel when we hire a man we hire his wife along with him. A particular example of that is once each year when we put out our program of progress, which is the basic compensation plan for the insurance year, the plans and so on of the company for the next year, we put out some planning forms and budget forms and our managerial people go into each agent's home and with this agent and his wife they make out their budget for the next year. And this form is so made that they convert his monetary needs into production that he must produce the next year. And then of course the wife and he together keep the records on how they are progressing during the year. So we take the wife very closely into our business.

regarded as corporate philanthropy. In the Company's eyes the key to the husband's success is the wife.[38]

All of this has a substantial bearing on tax deductibility. It, of course, affords ample basis for the Company to deduct its expenditures in wife cultivation. This does not automatically extend like treatment to the wife as recipient. But when the program is so well organized, the corporate wife propaganda so intense and continuous, is it not reasonable that husband and wife conclude it to be imperative that when the employer beckons, the wife must respond?[39]

In assaying this we need not consider it in terms of expenditures by the wife as such. Since the husband-employee's economic future is tied into the Company through the wife, and the Company expects the wife to attend, the cost of her travel and keep is an ordinary and necessary expenditure by the husband in his own right and not merely as a vicarious agent for her.

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[38]The Agency Vice President stated:

"A man's wife who is not sympathic with him in his business can have a tremendous influence on him. He would come home late and she would say why aren't you here on time, and he would say I am trying to make a living for you, an unappreciation of course that affects his morale."

Earlier he stated that less than 1% of unmarried men were hired. They rely on married men because "We find that this is a business * * * that requires an awful lot of a man. He lives in a unique type of atmosphere and he needs some ballast for his morale and it is our contention that a wife can assist tremendously and help him to keep his morale high and keep him moving and thinking positively about this business."

[39]It bears repeating that the President testified:

"Q. Does the company expect the wives of the agents to attend [the Torch Club]?

"A. Yes, sir."

The District Court categorically found that "The Company requires those * * * agents and their spouses to attend the annual meetings of the Torch Club. * * *." See note 32, *supra*. And to the wife this was not all free fun. She had the added expenses of a baby sitter, a maid and, of course, the fashionable new clothes.

Thus far what I have written sounds perhaps as though I think that the compulsory attendance of husband and wife was merely to satisfy the corporate ego. On the contrary, I think the evidence is overwhelming—and the Trial Court so found—that these hard-headed businessmen considered that money was spent by sandwiching in the ceaseless company pitch with the attractions found in a delightful resort area. In other words, it is certainly not for Judges situated where we are to say that no serious business advantage was obtained by Mr. Thomas. Until the Commissioner has to bear the financial responsibility for poor management decision, how is he to say that the participants will not obtain substantial help from this 3-day enforced togetherness as a captive group? Congress did not leave it to tax collectors or judges. The congressional test is in terms of the businessman's needs and practices. The ordinarily prudent or the ordinarily hard-headed businessman with a good deal of psychology on his side may well conclude that the "company message" can best be instilled by minimizing formal business sessions and expanding the so-called "free time" for each to receive new transfusions from others whose doubts, if they exist, will hardly be expounded in this atmosphere of good will. After all, on two of the days the day ended with the Company line being drilled in at Company dinners or banquets, and each day started bright and early with "breakfast with delegates" where the bill of fare most

likely was insurance as it would have been law had the participants been judges or lawyers.[40]

If the Company thought it important, if the Company required the husband (and wife) to be there, if the husband knew that he was expected and would suffer by not attending, his presence was important for two reasons. First, he would receive the benefits of this contact and instruction. Second, he would secure his job and economic future.

It is no answer to suggest that allowance of such deductions is open to abuse. There is scarcely anything in the complex tax law that is not. Abuses can be checked and prohibited by a determination of courts, either district or tax court, applying general principles to the facts at hand.

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[40]The Agency Vice President testified:

"Q. In planning these programs [Torch Club] what factors do you consider?

"A. Well just exactly what we are trying to do with our men, we are trying to motivate them to do a good job * * * and to use their potential ability * * *. More than that, attendance at this Torch Club gives the fellow an opportunity to know other outstanding men and exchange ideas with those people * * *. Knowledge of course is one of the purposes of the Torch Club. We of course have outstanding speakers to attend the meeting. And we try to give them instructions to go back and do an even better job when they get back home. One of the most valuable parts of the Torch Club convention is the fact that these agents come there and [get] to rub shoulders with other outstanding men in our company who are doing a good job and get the opportunity to exchange ideas * * *. And then the fact that they are there with the Home Office officials and the Directors of the company. * * * I think every man that attends a convention leaves * * * a little bit more sold on the company. I think this might be interesting as far as statistics are concerned. * * * We found that 60% * * * of our total agency organization have attended one of these Torch Club conventions and 83% of all of the men who terminated in our company have never attended one of these meetings. Eighty-three percent who terminated have never been there. So 17 percent is all who have terminated of the Torch Club organization."

Finally the disallowance of deductibility is contrary to the express regulation covering attendance of conventions.[41] And the Court's remand to allow a prorata deduction for Mr. Thomas' expenses while attending business meetings[42] is contrary to the express provision of § 162(2), see note 15, *supra*, that traveling expenses includes "the entire amount expended for meals and lodging * * * while away from home * * *."

The statute states that "The entire amount expended for meals and lodging" may be deducted. This, as we have recently pointed out in *Williams v. Patterson*, 5 Cir., 1961, F. 2d , [18371, Jan. 12, 1961], represents a congressional amendment to liberalize deduction to overcome niggardly rulings of the Revenue Service which attempted to limit deductibility to the *excess* of expenditures over those which otherwise would have been incurred. In addition, since the Court finds that Mr. Thomas was engaged in his trade or business while attending these business meetings, the question arises how did he get there? It is positive, and

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[41]Regulation § 1.162-2(d). "Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under § 162 depending on the fact and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of the deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meetings so that he is benefiting or advancing the interest of his trade or business by such attendance. If the convention is for political, social, or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible."

[42]The Court states: 'The taxpayer will be allowed a pro-rata deduction for the amount of time spent at the business meetings, but no deduction will be allowed for his travel expenses." Citing in footnote 13 Reg. 1.162-2 (b)(1), —F. 2d—at—.

the District Court found, that attendance in business sessions was compulsory.[43] The expense of compulsory attendance was not therefore the Smithfield ham and grits for the Company breakfast. To be there he had first to get there. That meant travel and travel meant cost. The regulations cannot take away that which the statute expressly allows. Since, on this Court's finding, Mr. Thomas was engaged in "the pursuit of [his] trade or business" while attending required business meetings held at a place "away from home," he was most certainly entitled to deduct the entire cost for meals and lodging for each of the days on which such sessions were held. For like reasons the cost of actual travel is within the express terms of the statute.

In principle[44] the Taxpayer proved, as the District Court found, overpowering business compulsion and the deductions ought to have been allowed.

I therefore respectfully dissent.

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[43]The Court formally found "attendance of those present upon the scheduled program is required and plaintiffs did so attend."

[44]I have not undertaken to consider specifically the item of $12.92 for the sight-seeing trip to Williamsburg, Virginia. Perhaps other considerations apply as to it.

APPENDIX E

Management Trends, Page 15 (September 28, 1957):

"*What are the advantages of a national meeting?* Here are some of them:

1. *Concentration of best talent:* Your top executives, specialists and best salesmen are on hand to impart ideas.

2. *More spectacular:* With ingenuity you can make a national meeting an event to remember for not days, but years.

3. *Sharing of experiences:* Men with common interests and problems have an opportunity to swap ideas with the largest number of their contempories.

4. *More spirit:* As part of a large homogeneous group, salesmen can generate more enthusiasm and be inspired to a greater degree.

5. *Conservation of executives:* While a little more top executive time goes into planning, executives devote less time at a national meeting than a series of regional events which take them on the road."

Royal Bank of Canada Monthly Letter, Vol. 39, No. 2, page 1 (February, 1958):

"Conferences of all sizes and sorts are important in business life, in professional life, in politics and in the home. Many a person has been frustrated in carrying out his plans because he did not consult the people concerned, learn their ideas, and win their interest.

"The conference we are about to plan is not a convention of men and women who have come together for good cheer, but a meeting of people to discuss issues of interest to them, to contribute ideas, and to carry away thoughts that will be worth remembering.

"We live in a society of growing complexity, in which no one person can know all about anything. A conference brings together people with diverse notions and varied kinds of information. The exchange of thoughts and the pooling of ideas and the study of solutions—these are the essence of the conference method.

"There are subsidiary benefits, too. A conference will give the people who participate in it a better sense of identity. They will be confirmed in their partnership in a common effort. They will prove to themselves the benefit of convincing and persuading rather than overruling one another.

• • • • •

"Do not lose sight of the splendid opportunity this gathering gives you to tap the creative resources of all these individuals who come to your conference inspired by fellowship in a mutual endeavor and stimulated by the exchange of ideas. Determine at the beginning to so shape your conference as to make the most of it. If people go away from your conference with the feeling of belonging to your organization in a valuable way, that is a bonus value that may be more important to your business than all the other conference benefits.

"This statement is true of all sorts of conferences, from the great trade association conference through those of individual businesses and professional societies, to the family conference. • • •."

Report No. 15, Life Insurance Sales Research Bureau (November, 1924) (Excerpts from same):

"One of the chief things to be accomplished by a convention is to secure unanimous understanding of the principles underlying the company's sales operations and the rules which experience has proved to be essential in carrying out those principles. There is no sales organization anywhere which has a complete and un-

animous grasp of these matters but a convention can do more to give the men that grasp than anything else. Home Offices are constantly under the necessity of formulating principles and rules, and they are similarly in a constant state of disappointment because they are not understood. The convention is the place above all others where this can be accomplished."

* * * * *

"The extent to which the Home Office arranges for transportation depends largely upon the situation of the convention city. If it is centrally located with many lines of approach, it would be impracticable to arrange for many men to meet on their way to the convention. But if the convention is to be held in an isolated spot, or one at considerable distance from the home of the majority of the members attending, then specific plans may be made for assembling at some nearer location and proceeding together to the destination. If this latter is at all feasible, it is desirable for several reasons. It gives the men a peculiar feeling of satisfaction to travel on a "special" train or on "special" cars, it encourages a friendlier feeling than is generally present at conventions at which the men arrive as strangers, it makes the men more anxious to get down to the real work of the convention when they arrive at their destination, and, above all, it has a decided educational value in its contacts and ever present business discussions."

* * * * *

"Today an ever increasing number of wives take a real interest in what their husbands do, and this interest is frequently referred to by men as being of very great value to them. In fact, it has been said that a wife can not usually be so wholly lacking in contact with her husband's work as to have no influence at all upon it.

"In many cases, this influence is negative rather than positive, and this is particularly true in the

careers of many life insurance agents because their work frequently involves evening appointments—a condition usually resented by a wife. Many a wife has thoroughly discouraged her husband because the only thing which she ever knew about his work was that he had to go out at night or that he had failed to 'write that ten' which would give her a new dress. She knew nothing about the bigger things which life insurance accomplishes and of which her husband was or could be a part. The recognition of the very great desirability of 'selling' the wife on her husband's job has spread rapidly in recent years, and today many husbands are helped over the rough spots of their career by the enthusiasm and vision of their wives, much of which can be aroused or increased at a convention."

• • • • •

"Whether a convention is intended to provide instruction or to rouse company loyalty through inspirational talks, there is one thing which should run through all its preliminary plans and all its sessions, the spirit of cordiality and hospitality. As one company expressed it—'We always try to do just a little bit more for our men than they expect.'

"The public expects much of the life insurance business in the way of intelligent, prompt service, and this service is made up of that which is contributed by the Home Office as well as by the agent. The Home Office continually strives to improve both of these factors, and one of its best opportunities to show to its field force the kind of service which it is capable of rendering is at its convention.

"We have endeavored to describe in the preceding pages those items which appear to contribute to the smooth running of a meeting, but over and beyond such matters are the almost countless things which can be done for the pleasure of the visitors. From the moment when they first hear of the proposed meeting until they have returned to their desks, the company has innum-

erable, small opportunities to impress them with the fact that their company is far from a 'soulless corporation'. It is these human relations which steady and even inspire many a man in days of doubt and discouragement, in those days when he thinks that perhaps he is in the wrong business or in the wrong company."

Life Insurance Agency Management Association, *Motivation*, page 38 (May, 1958):

"Few insurance wives, particularly among the younger men, have the same apparent security as other women they know—their neighbors, their bridge club associates, their friends whose husbands have salaried jobs with title and regular hours in local industry or business. In many instances the agent's wife enjoyed this kind of stability in the not-too-distant past before her husband joined your agency. Until recently he was 'connected with the bank'—true, he did not make any money, but there was a certain sense of security and stability through such an association whether he was the janitor or the president. Now, he is a salesman. If he is a success, he will remain a salesman. Chances are he will never have a prestige title such as 'second vice president.'

"He may already have a full-time secretary; he may even have an assistant who prepares his security charts and bird dogs for him; he may even have a second girl taking care of his birthday cards, age-change letters, blotters, etc., but he will never have 50, 100 or 1,000 people working for him. On the other hand, unlike other professional men, he does not sit in his office and wait for people to make appointments to see him. He solicits business—even at the country club dance in a subtle way on Saturday nights! He works at night, either calling on prospects or studying after the children go to bed. The odds are probably one thousand to one that when Mrs. Agent was 18 and dreamed of her future

life, she certainly did not vision a life insurance salesman for a husband!

"To be sure your agent is making more money than the husbands of any of Mrs. Agent's friends. He has a lovely home in the best section of town; he belongs to the best clubs; he travels in the best circles, and entertains the nicest people. Your agent is happy in his work, proud of his calling and needs to apologize to no one. Let us hasten to add that Mrs. Agent is proud of her husband, shares his belief in the product, and often heaves a big sigh of relief that she did not marry that young engineer, or that good looking fellow down at the bank.

"Nevertheless, to the wife of the ten-year veteran as well as the starry-eyed wife of the first-time qualifier, going to a fabulous resort hotel, getting away from the children for a week, having breakfast in bed, and no dishes to wash—these are rewards that money could never measure.

A Higher Standard of Living

"It is gratifying to make Mrs. Agent happy, but what does it mean to you as an agency manager? It means that Mrs. Agent is going to have a much bigger concept of her husband's job; she is going to have a measure of that security and prestige that she wants; she is going to accept more graciously Mr. Agent's evening appointments and late dinners, and she will be ever so much better equipped to encourage and to help him during his temporary slumps.

"This experience does something else for the wife of a young agent. It exposes her to a higher standard of living. The comforts and luxuries at the convention she enjoyed. She wants more! She and her husband both have a sense of arriving, of accomplishment. They will never completely go back to their old world. These new desires, this new ego ideal will be translated into more

production and accelerated growth in this wonderful business.

"Let's make sure that our agents' wives are qualified too! And if under our convention rules men cannot qualify their wives through production, we can still encourage their attendance by helping the agent pay his wife's way through increased commissions for production well in excess of his quota.

"But there are disadvantages to conventions also: time out at a convention interrupts momentum. In order to qualify for the convention our men were organized; they were out seeing people; they were closing sales. The more of our agents who qualify for the convention, the more the agency will be disrupted by their absence. Conventions cost dollars; dollars in production loss as well as actual convention expenses for the company. Conventions cost dollars to the agent who brings his wife, who pays for a housekeeper for the children, who spends more money than he contemplated, and who also has lost one week, two weeks, three weeks of production. Knowing these problems as we prepare for a convention qualification period, we can plan to minimize them.

"One manager tries to make it easier for the wives to attend by running an agency contest during the convention qualification period. He gives three cash prizes each month based on paid premiums against percentage of quota. The prizes, however, are awarded not to the men but are sent to their wives earmarked for convention expenses! Hugh Bell sells the idea to his men of the wonderful opportunity a convention is to improve oneself. He tells them of the company leaders whom they can look forward to meeting from other parts of the country, of the ideas they will get. And in a later section of this chapter, we shall discuss ways of compensating for these disadvantages of loss of momentum, costs of travel, and loss of production."

From George E. Sokolsky, published in Miami Hearld (July 5, 1961) (Excerpt from same):

"One of the most important phases of American business activity is the convention, where men meet those who are in the same line or who have similar or associated interests. They listen to speeches on important subjects, often by government representaives. New ideas are widely circulated and products are exhibited. The convention is essential to the conduct of modern business because men live so far apart.

"Such conventions usually are held in large cities where there are suitable convention halls. Many large cities maintain convention bureaus to get the conventions to come to their cities."

Sales Meeting magazine, May 19, 1961:

"It's time that they stop playing with the fiction in Washington that conventions and sales meetings are a romp. In their zeal to prove that they are safeguarding our tax structure, our revenue 'experts' are tampering with a vital element of our economy.

"Conventions are not fun. Sales meetings are not outings. They are hard, serious events. They are part of our economy- a part that has contributed to our nation's economic strength.

"Our conventions, sales meetings and trade shows make us different from the nations abroad. These events reflect a difference in the way we do business, educate ourselves, and share our knowledge. Foreign nations have not had the advantage of our type of conventions and sales meetings. Only recently have they adopted what has been a strengthening factor in our economy.

"Let's not lose this advantage in the name of tax reform!

"Recent tax and court decisions have started what could be a dangerous trend. They would brand conven-

tions and sales meetings as doubtful business expenses. While the decisions are still few, they set damaging precedents.

"In their zeal to close tax loopholes, law makers and government administrators must be cautioned against considering meetings as something other than business. As an intelligent business executive, you should be alert to the need to maintain our convention, sales meeting and trade show efforts against damaging taxation.

"Several dangers grow from the new appraisals by our taxing authorities:

"1. To prove that meetings are strictly business, some meeting planners are over-packing their programs. They are bending over backwards to make meetings 'meaty' with an eye to the tax collector. What this does is to feed into a group activity more than the audience can digest. Recently, we've learned of meetings that challenge human endurance. There's just so much that the mind can assimilate without time out to relax.

"2. Some meeting planners are restricting their choice of meeting sites—against the best interest of meeting goals—because tax men look askance at meetings in luxury surroundings.

"We take exception, too, to the tax collectors' opinion of wives at conventions. Nobody who attends a meeting can assail the wisdom of including wives. Yet, tax-wise, you may suffer when they are included. Wives do more good for a convention and sales meeting than almost any element in the plans. They are a sound business 'investment' for any meeting—but our tax regulations militate against them. This is wrong!

"Let's not tax our conventions and sales meetings into impotence! Our nation has grown strong because of our well-developed communications through meetings and exhibits. Let's not sit by while zealots in Washington picture conventions as hell-razing parties, sales meetings

as indulgent vacations, and trade shows as tax-dodging schemes.

"What tax hawks have to learn is that they will lose, not gain tax dollars, with oppressive restrictions on meetings and trade shows. They will make it more costly for industry and the professions to disseminate product and technical facts. They will kill the advantages we enjoy from free flow of information.

"Imagine the cost to the nation if new developments in industry and the professions could not be rapidly spread through our established conventions and shows.

"If you have fears of foreign competition, consider the even greater threat if our communication arms were tied behind our backs through tax rules. While we might tax our direct communications into impotency, our foreign competitors are taking up our meeting techniques to beat us at our own game.

"Let us not be driven down the path being paved by the tax authorities. Conventions, sales meetings and trade shows must be kept strong and productive. To tax them into a straight jacket, we lose one of the greatest forces for an expanding economy that we have."

APPENDIX F

Section 61, IRC of 1954:

"Sec. 61. (a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

(b) CROSS REFERENCES.—

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following)."

Section 62, IRC of 1954:

"Sec. 62. For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) TRADE AND BUSINESS DEDUCTIONS—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) TRADE AND BUSINESS DEDUCTIONS OF EMPLOYEES.—

(A) REIMBURSED EXPENSES. — The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer.

(B) EXPENSES FOR TRAVEL AWAY FROM HOME.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(C) TRANSPORTATION EXPENSES.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(D) OUTSIDE SALESMEN.—The deductions allowed by part VI (sec. 161 and following) which are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer."

Section 63(a), IRC of 1954:

"Sec. 63. (a) GENERAL RULING.—Except as provided in subsection (b), for purposes of this subtitle the term 'taxable income' means gross income, minus the deductions allowed by this chapter, other than the standard deduction allowed by Part IV (sec. 141 and following)."

Section 161, IRC of 1954:

"Sec. 161. In computing taxable income under Section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in Part IX (sec. 261 and following, relating to items not deductible)."

Section 162(a), IRC of 1954:

"Sec. 162. (a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid

or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000."

Reg. §1.162-1(a):

"(a) In general. Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as a basis for a deduction or a credit under provisions of law other than section 162. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted

from gross sales in computing gross income. See § 1.61-3(a). Among the items included in business expenses are management expenses, commissions (but see section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see § 1.62-2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. No such items shall be included in busines expenses, however, to the extent that it is used by the taxpayer in computing the cost of property included in its inventory or used in determining the gain or loss basis of its plant, equipment, or other property. Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is nevertheless deductible even though such expenses exceed the gross income derived during the taxable year from such business. In the case of any sports program to which section 114 (relating to sport programs conducted for the American National Red Cross) applies, expenses described in section 114(a)(2) shall be allowable as deductions under section 162(a) only to the extent that such expenses exceed the amount excluded from gross income under section 114(a)."

Reg., § 1.162-2:

"§ 1.162-2. Traveling expenses.—(a) Traveling expenses include travel fares, meals and lodging, and expenses incident to travel such as expenses for sample rooms, telephone and telegraph, public stenographers, etc. Only such traveling expenses are are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incidental to travel are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including travel fares, meals and lodging, and expenses incidental to travel are business expenses. For the allowance of traveling expenses as deductions in determining adjusted gross income, see section 62(2)(B) and the regulations thereunder.

"(b)(1). If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductive only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.

"(2). Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of clear showing to the contrary.

"(c) . Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

"(d). Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not neces-

sarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible.

"(e). Commuters' fares are not considered as business expenses and are not deductible.

"(f). For rules with respect to the reporting and substantiation of traveling and other business expenses of employees for taxable years beginning after December 31, 1957, see § 1.162-17."

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616594—61—1

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH AND IRMA M. RUDOLPH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 96–100; Pet. 31–35) is reported at 189 F. Supp. 2. The opinion of the court of appeals (Pet. 37–45) is reported at 291 F. 2d 841.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1961 (Pet. 45), and the petition for rehearing was denied on July 28, 1961 (Pet. 47). The petition for a writ of certiorari was filed on September 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The taxpayer, an insurance agent in Dallas, Texas, was awarded by his employer an all-expense paid trip, for himself and his wife, to the Waldorf Astoria Hotel in New York City where his employer held a vacation-convention for those of its agents and salesmen who had satisfied specified performance standards. The questions are:

1. Whether the amounts paid by the employer, on behalf of the taxpayer and his wife, for their transportation to New York and for their accommodations, meals, and entertainment there and the amounts paid to the taxpayer for additional meals in New York constituted gross income to the taxpayer.

2. Whether the expenses incurred by the taxpayer and his wife, for transportation to New York and for accommodations, meals, and entertainment there were deductible ordinary and necessary business expenses of the taxpayer or were nondeductible personal expenses.

STATUTES AND REGULATIONS INVOLVED

Sections 61, 62, 74, 162, and 262 of the Internal Revenue Code of 1954 and Treasury Regulations on Income Taxes (1954 Code), Sections 1.61-1, 1.61-2, and 1.162-2 appear in the Appendix, *infra*, pp. 11–16.

STATEMENT

The taxpayer, C. J. D. Rudolph,[1] is an insurance agent selling for Southland Life Insurance Company. During 1956, he was a resident of Dallas, Texas, where

[1] Mr. Rudolph and his wife filed a joint return for 1956. Mr. Rudolph, however, is referred to as "the taxpayer."

the home office of the company was located. In 1956 the taxpayer qualified to attend the company's convention in New York City and also to bring his wife by selling the requisite amount of insurance as determined by the company. The convention trip consumed approximately five days. Of this time, one morning session was devoted to a business meeting, followed by a business luncheon. The remaining time was devoted to travel, sightseeing, entertainment, fellowship or free time[2] (R. 16, 96–97, 114; Pet. 32).

The admitted value of the all-expense paid trip from Dallas to New York City, taken by the taxpayer and his wife in 1956 and paid for by the company, was $560. The taxpayer and his wife failed to report this amount on their joint income tax return for 1956 and the Commissioner assessed a deficiency in income tax in the amount of $126.90, which then was paid with interest (R. 96–97; Pet. 31).

In the subsequent suit for refund the district court held that the trip had been earned by the taxpayer, was in the nature of a bonus, reward, and compensation for a job well done, and that, as compensation,

[2] The convention schedule in New York, set forth in the program published by the company (R. 104–109), commenced with a sightseeing trip to the Waldorf Astoria and included a single morning business session, a group luncheon at the Waldorf at which the speaker was Dr. Norman Vincent Peale (R. 111–113), a sightseeing tour of Manhattan, breakfast and fashion show for the women, and such other "Company-Arranged Convention Events" as the Christmas show at Radio City Music Hall, an evening at the Copacabana Night Club, radio and television shows, tours of the Empire State Building, Rockefeller Center, and radio and television studios, all of which were available to the taxpayer and his wife at company expense.

the $560 value of the trip properly was included in the income of the taxpayer and his wife. The district court further held that since the trip was primarily a pleasure trip in the nature of a vacation, its cost was a personal expense of the taxpayer and his wife and therefore was not deductible by them (R. 99–100; Pet. 34–35).

The court of appeals (Judge Brown dissenting) affirmed, *per curiam,* upon the facts set forth in the opinion of the district court and upon the basis of its opinion in *Patterson* v. *Thomas,* 289 F. 2d 108 (C.A. 5) (Pet. 37–45; 49–74).

ARGUMENT

This case involves the same issues as *Patterson* v. *Thomas* 289 F. 2d 108 (C.A. 5), certiorari denied, October 9, 1961 (No. 109, this Term). The determination of the courts below that the convention trip was primarily for the pleasure of the taxpayer and his wife, rather than for business, and therefore that its value constitutes gross income and is not deductible from gross income as business expenses, depends upon the particular facts of this case.[4] These concurrent findings are final in the absence of a very exceptional showing of error. *Comstock* v. *Group of Investors,* 335 U.S. 211, 214. On this record, the district court's findings were certainly not clearly erroneous. There are no conflicting decisions and, as in the *Thomas*

[4] Judge Brown, who dissented in both cases, agreed in *Thomas* (pet. 59) and apparently does here, that the amounts in dispute constituted gross income.

case,[4] there is no need for further review by this Court.

1. Section 61 of the Internal Revenue Code of 1954, Appendix, *infra*, p. 11, defines gross income as including "all income from whatever source derived * * *." This definition was intended by Congress to be "all-inclusive" (*Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 432) and clearly is broad enough in scope to include as income amounts paid by a corporation in forms other than cash to employees who have done outstanding work. See Treasury Regulations on Income Tax (1954 Code), Sections 1.61–1 and 1.61–2(d) (1) and (3), Appendix, *infra*, pp. 13–14.

In the present case the taxpayer qualified to receive from his employer an all-expense paid trip for himself and his wife by satisfying previously established performance standards in his work. The payments do not come within any statutory exemption from gross income, and there is no provision in the revenue laws for any non-statutory exemption by analogy such as taxpayer suggests (Pet. 15–16).

Moreover, Section 74 of the 1954 Code, Appendix, *infra*, pp. 12–13, provides that amounts received as prizes and awards are included in gross income. As the district court found (Pet. 34), the trip in issue here was a "bonus, reward, and compensation for a job well done."

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[4] In *Thomas*, the taxpayer did not petition for review of the holding that the cost of the trip paid by the company constituted gross income.

2. Section 62(2) of the 1954 Code, Appendix, *infra*, pp. 11–12, provides that an employee may deduct from his gross income expenses for travel, meals, and lodging "paid or incurred by the taxpayer, in connection with the performance by him of services as an employee." Section 62(2) makes these expenses deductible only insofar as they constitute "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *" under Section 162(a), Appendix, *infra*, pp. 12–13. That is, the expenses must be "reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it * * *." Treasury Regulations on Income Tax (1954 Code), Section 1.162–2, Appendix, *infra*, pp. 15–16. Travel expenses for personal activities are not deductible. Section 262, Appendix, *infra*, p. 13; Treasury Regulations on Income Tax (1954 Code), Section 1.262–1.

When the travel takes place for both business and personal reasons, the expense of travel to and from the place where the activity takes place is not deductible if the primary purpose of the trip is personal. Expenses incurred at the destination and properly allocable to the taxpayer's trade or business are, however, deductible. Treasury Regulations on Income Tax (1954 Code), Section 1.162–2(b)(1). Similarly, the expenses of a taxpayer in attending a convention or meeting may be deductible if incurred for business purposes but not if the convention is for social, political, or similar purposes. Treasury Regulations on Income Tax (1954 Code), Section 1.162–2(d). Thus, it is undisputed (Pet. 21, 54) that the determination

as to deductibiiity depends upon whether the primary purpose of the trip was business or pleasure.

The nature of the trip must be determined from the individual taxpayer's point of view and is not established by the viewpoint of his employer. *Patterson* v. *Thomas, supra,* 289 F. 2d at 112–113 (C.A. 5) (Pet. 54–55). In determining the purpose of the trip in the *Thomas* case, *supra,* the court of appeals considered factors (289 F. 2d at 113–114; Pet. 55–58) closely analogous to the following circumstances which it found require the same result in this case (Pet. 37–38):

(a) During the entire convention period of about three days in New York City, the taxpayer attended only one business meeting, lasting approximately two and one-half hours, and a group luncheon immediately thereafter.[5] The program was planned so that petitioner could spend the remainder of his time taking advantage of the many recreational and entertainment activities available in New York City of the type usual on a vacation.[6] The taxpayer's selection of entertainment during much of this time was entirely within his own discretion. The taxpayer took ad-

[5] Treasury Regulations on Income Tax (1954 Code), Section 1.162–2(b)(2) state (Appendix, *infra,* pp. 15–16): "The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal."

[6] See *supra,* p. 3, note 2, as to the various entertainment available to the taxpayer during the trip.

vantage of these opportunities. He and his wife had looked forward to and planned the trip (R. 34–39, 104–107).

(b) The convention was sponsored and paid for by the taxpayer's employer and the only participants were taxpayer's co-employees who had attained pre-established performance standards (R. 22, 30, 40, 44, 54–55, 114–119).

(c) The convention was held at a luxury hotel in New York City, at an unnecessary distance, with respect to business purposes, from the home office of the company in Dallas, Texas, and the homes of the convention participants (R. 98–99, 111; Pet. 33–34).

(d) The attitude of the company was that the convention trip "was planned with your [the agents'] pleasure in mind." In the convention program the qualifying agents were urged to "ENJOY YOURSELF" (Plaintiff's Ex. 10).[7]

These factors clearly support the determination of the courts below that the convention trip was primarily for the pleasure of the taxpayer and his wife and not for business purposes. The taxpayer was not entitled to deduct his travel expenses since his trip was for personal purposes. Sections 162(a) and 262 of the 1954 Code; Treasury Regulations on Income Tax (1954 Code), Section 1.162–2(b) (1), (d). Similarly, since only a negligible amount of the taxpayer's time in New

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[7] A portion of Plaintiff's Exhibit 10, the convention program, is printed (R. 104–107). Additional portions, including the quoted portion of the welcoming statement of the company vice-president, were printed as Appendix B to the government's brief below.

York was devoted to business, none of his expenses there were deductible. Treasury Regulations on Income Tax (1954 Code), Section 1.162-2(b)(1).

3. In the case of his wife, the taxpayer's expenses at the convention were incurred solely for the purpose of providing her with a vacation at a luxury hotel in New York City. She was not an employee of her husband or of the company, and her husband could have attended the convention without her (R. 40-41, 92). She occupied herself in New York with the tourism and entertainment usual on a vacation (R. 34-35, 38-39, 104-107). The record does not indicate that she spent any of her time in New York on work concerned with her husband's business, and at the trial of this case she was unable to think of anything she had learned about her husband's business which she had not known prior to the 1956 convention (R. 93). Since her presence at the convention had no bona fide business purpose from the viewpoint of the taxpayer—as opposed to any benefit her presence may have had from the standpoint of the Company—the deductions claimed for her expenses were properly denied. *Patterson* v. *Thomas, supra,* 289 F. 2d at 114 (Pet. 59); Treasury Regulations on Income Tax (1954 Code), Section 1.162-2(c). See also *Silverman* v. *Commissioner,* 253 F. 2d 849 (C.A. 8); Rev. Rul. 55-57, 1955-1 Cum. Bull. 315; Rev. Rul. 56-168, 1956-1 Cum. Bull. 93.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOHN B. JONES, JR.,
Acting Assistant Attorney General.
I. HENRY KUTZ,
NORMAN H. WOLFE,
Attorneys.

OCTOBER 1961.

APPENDIX

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

* * * * *

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) *Trade and business deductions.*—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) *Trade and business deductions of employees.*

(A) *Reimbursed expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer.

(B) *Expenses for travel away from home.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from

home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(C) *Transportation expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(D) *Outside salesmen.*—The deductions allowed by part VI (sec. 161 and following) which are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer.

* * * *

SEC. 74. PRIZES AND AWARDS.

(a) *General Rule.*—Except as provided in subsection (b) and in section 117 (relating to scholarships and fellowship grants), gross income includes amounts received as prizes and awards.

(b) *Exception.*—Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievements, but only if—

(1) the recipient was selected without any action on his part to enter the contest or proceeding; and

(2) the recipient is not required to render substantial future services as a condition to receiving the prize or award.

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

Treasury Regulations on Income Taxes (1954 Code):

SEC. 1.61–1. *Gross income.*—(a) *General definition.*—Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. Section 61 lists the more common items of gross income for purposes of illustration. For purposes of further illustration, § 1.161–14 mentions several miscellaneous items of gross income not listed specifically in section 61. Gross income, however, is not limited to the items so enumerated.

* * * * *

SEC. 1.61–2. *Compensation for services, including fees, commissions, and similar items.*—(a) *In general.*—(1) Wages, salaries, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips,

bonuses (including Christmas bonuses), termination or severance pay, rewards, jury fees, marriage fees and other contributions received by a clergyman for services, pay of persons in the military or naval forces of the United States, retired pay of employees, pensions, and retirement allowances are income to the recipients unless excluded by law. Several special rules apply to members of the Armed Forces, Coast and Geodetic Survey, and Public Health Service of the United States; see paragraph (b) of this section.

(2) The Internal Revenue Code of 1954 provides special rules including the following items in gross income:

* * * * *

(iii) Prizes and awards, see section 74 and the regulations thereunder.

* * * * *

(d) *Compensation paid other than in cash.*—(1) *In general.*—If services are paid for other than in money, the fair market value of the property or services taken in payment must be included in income. If the services were rendered at a stipulated price, such price will be presumed to be the fair market value of the compensation received in the absence of evidence to the contrary.

* * * * *

(3) *Meals and living quarters.*—The value of living quarters or meals which an employee receives in addition to his salary constitutes gross income unless they are furnished for the convenience of the employer and meet the conditions specified in section 119 and the regulations thereunder. For the treatment of rental value of parsonages or rental allowance paid to ministers, see section 107 and the regulations thereunder; for the treatment of statutory subsistence allowances received by police, see section 120 and the regulations thereunder.

* * * * *

SEC. 1.162–2. *Traveling expenses.*—(a) Traveling expenses include travel fares, meals and lodging, and expenses incident to travel such as expenses for sample rooms, telephone and telegraph, public stenographers, etc. Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including travel fares, meals and lodging, and expenses incident to travel, are business expenses. For the allowance of traveling expenses as deductions in determining adjusted gross income, see section 62(2)(B) and the regulations thereunder.

(b) (1) If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.

(2) Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an

important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary.

(c) Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

(d) Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible.

(e) Commuters' fares are not considered as business expenses and are not deductible.

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS, C. J. D. RUDOLPH AND IRMA M. RUDOLPH

FELIX ATWOOD,
RICHARD A. FRELING, of
TURNER, WHITE, ATWOOD, MEER & FRANCIS,
1900 Mercantile Dallas Building,
Dallas 1, Texas,
Attorneys for Petitioners.

WARLICK LAW INC — 2263 VALDINA STREET — DALLAS — ME 1-3130

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In the

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OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH AND IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF PETITIONERS, C. J. D. RUDOLPH AND IRMA M. RUDOLPH

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals for the Fifth Circuit (R. 96-102) are reported at 291 F. 2d 841-845. The opinion and judgment of the Federal District Court for the Northern District of Texas, Dallas Division, was issued September 28, 1960 (R. 78-82), and is reported in 189 F. Supp. 2.

JURISDICTION

The judgment of the Court of Appeals was entered June 27, 1961 (R. 96). The petition for a Writ of Certiorari was filed on September 11, 1961. The Writ of Certiorari was granted November 13, 1961 (R. 106). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether an insurance agent realizes taxable income when the insurance company for which he works pays his and his wife's expenses of traveling to and attending a convention of the company's agents where, because of concern for his economic security, he is compelled by the company to attend, has no control over the mode of travel, accommodations or activities, and the convention is designed and intended primarily for the business purposes of the company not as compensation to the agent.

2. Whether, in the alternative, the reasonable expenses of an insurance agent in traveling to and attending a convention of agents of the insurance company for which he works constitute ordinary and necessary expenses of carrying on a trade or business where the business of the convention is directly related to his job and where, because of concern for his economic security, he is compelled by the company to attend.

3. Whether, in the alternative, the reasonable expenses of an agent in bringing his wife to a business convention under the foregoing circumstances constitute ordinary and neces-

sary expenses of carrying on a trade or business where, as part of a long-range and continuous program of business education, the company expects that the wife attend and would view with disfavor her failure to attend without adequate reason.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Sixteenth Amendment to the Constitution of the United States; Sections 61, 62(1) and (2), 63(a), 161 and 162(a) of the Internal Revenue Code (1954) [26 U. S. C. §§61, 62(1) and (2), 63(a), 161 and 162(a)]; U. S. Treas. Reg. 118, §§ 39.23(a)-1 and 39.23(a)-2; and U. S. Treas. Reg., §§1.62-1(a) and (c)(1) and 1.162-2 (1954) [26 C. F. R. §§1.62-1(a) and (c)(1) and 1.162-2], pertinent provisions of which are printed in Appendix A, p. 47.

STATEMENT

Statement of Facts. The Southland Life Insurance Company (hereinafter sometimes referred to as "Company") sponsors a national convention for certain of its agents and their wives approximately every eighteen months (R. 31). The Company convention is traditional in the life insurance business (R. 65), having been recognized for at least thirty-five or forty years as one of the most effective types of sales procedure for training the agents and improving their morale (R. 68). It is one of the established roots of agency management (R. 69).

The management of the Company, especially Kenneth B. Skinner, the Vice President and Agency Director, and his staff worked for many months in arranging for the 1956 convention of the Company's agents in New York City (R. 45, 46). They put into effect a program designed to attract the agents and their wives, selected the means of transportation and chartered special trains to take the agents, their wives, and certain of the Company officials and their wives to the convention. They provided transportation from the train to the hotel which they had selected and arranged the rooms to be occupied, scheduled the time and context of the formal business program, arranged for various group activities for the persons attending the convention, and provided group transportation for most of the events and back to the special train for return to Dallas. All persons attending the convention were required to abide by transportation, accommodation and activity arrangements (R. 25, 28).

The Petitioner, C. J. D. Rudolph (hereinafter sometimes referred to as "Rudolph"), has continuously worked for the Company since September 14, 1932, as an ordinary life insurance agent (R. 22, 41). He was an independent contractor of the Company under a contract terminable at the will of the Company (R. 43).

The Company selects men to attend a convention based upon their proven abilities, as well as their aptitude for the insurance business; the amount of insurance written is an important yardstick in measuring their ability (R. 61).

The Petitioners were invited to the convention for the purpose of instruction (R. 49), and for the purpose of communicating to the agents the Company's objectives and plans (R. 46). Rudolph had written an amount of business during a specified period which made him and his wife eligible to be asked by the Company to attend the convention. The yardstick used by the Company for determining eligibility to attend the convention was not intended to single out certain men for a prize or award (R. 46); rather, the Company management concluded that these agents would be most likely to benefit from the overall program of the convention, including informal discussions among agents and the officers of the Company (R. 62). Even though an agent was eligible, he could not attend unless invited by the Company (R. 49).

The Company deems the conventions to be of such importance that it looks with serious displeasure upon any agent or his wife who, without good reason, does not attend (R. 54). The Company management considers it a part of the agent's duty and responsibility to attend a convention when invited (R. 61, 74). Rudolph believed that he and his wife were required to attend the convention (R. 28), and he did not feel that the convention trip was a vacation (R. 43, 45). The convention site was selected out of the rather limited number of cities available to meet the criteria of the Company, such as housing all of the group in one hotel, having facilities for meeting rooms, transportation and availability of speakers (R. 57, 58).

Petitioners, along with 293 Southland agents, officers and employees (R. 48), left Dallas, Texas, by special trains

about 9:30 P.M. on Tuesday, December 11, 1956, and arrived in New York City on the evening of Thursday, December 13, 1956 (Pl. Ex. 10, R. 83), about dark (R. 34).

The formal business session of the convention commenced at 9:30 A.M. on Friday, December 14, 1956, and the following is a summary of the agenda of such session (Pl. Ex. 11, R. 86, 87): Kenneth B. Skinner, Vice President and Agency Director, presided; the Invocation was given by Neil H. Wright, Lubbock, Texas; Ben H. Carpenter welcomed the conventioners to New York; there followed an agents' panel discussion with the theme "Success Through Planning" in which the Director of Sales Training and some of the leading agents of the Company participated; Glenn M. Brooks told of "The 1957 Agency Activity Program"; next was a speech by Dan C. Williams, President of the Company, on "Our Southland Life Future"; followed by an address by John W. Carpenter, Chairman of the Board, on the subject "Your Company and Mine." At 12:30 P.M. on that day the agents and officers of the Company attended a luncheon presided over by Field Scovell, Vice President and Superintendent of Ordinary Agencies, and the principal address was given by Dr. Norman Vincent Peale, whose subject was "Success Through Right Thinking." It was arranged that his address, while inspirational in character, would fit in with the theme of the convention (Pl. Ex. 14, R. 89, 90), and he accomplished such purpose (R. 52). On the afternoon of Friday, December 14th, following the luncheon, sightseeing buses took the agents and their wives on a sightseeing tour which ended about 5:30 P.M. (Pl. Ex. 10, R. 84).

On Saturday, December 15th, a breakfast and fashion show for ladies only was held but was not attended by Mrs. Rudolph (R. 38). Tickets were provided for a special Christmas show at Radio City Music Hall at 1:15 P.M. on Saturday, December 15, and at 6:30 P.M. buses were provided to transport the agents and their wives to the Copacabana for dinner, dancing and a floor show, with buses returning at 10:00 P.M. (Pl. Ex. 10, R. 84, 85). On Sunday morning, December 16th, buses were provided for the transportation of the Southland personnel attending the convention from the hotel to the trains (Pl. Ex. 10, R. 86), and the trains arrived in Dallas on December 18th.

All aspects of the convention were determined by the management of the Company, including the time and mode of travel, the place, location and character of the convention, the hotel accommodations, as well as all other activities of the convention (R. 32, 46). Neither the agent nor his wife did or could receive anything in lieu of going to the convention (R. 32, 54). The Company provided no liquor and held no cocktail parties (R. 43).

The Government does not question the bona fides of the convention (R. 67). The travel to and from the convention, as well as the various entertainment activities of the convention, were planned so that the agents and officers of the Company would be together in groups at all possible times, because it was the opinion of the Company management that the informal exchange of ideas among the agents and officers was of as great importance as the formal business sessions (R. 62) and furthered the essential business purpose

of the convention (R. 69, 74). The Petitioner, Rudolph, participated in these informal discussions not only in New York City, but on the train up and back (R. 29), and in his judgment the convention helped him in his business (R. 28).

The Company considers that an agent's wife plays an important role in his career (R. 52, 53), and her help may determine his success or failure (R. 46). The conventions sponsored by the Company are designed to furnish a program of instruction and association with the other wives of agents and Company officials which serves to teach an agent's wife how to help her husband (R. 53). Her presence serves a bona fide business purpose (R. 69), and is deemed desirable by the Company management (R. 48, 53). The wife's importance to her husband's business is recognized by the Company. The Company requires an interview with the wife in the agent's home prior to employment of the agent so that she may be fully aware of the contribution she can make to her husband's success (R. 53). The Company distributes a booklet to the wife of a new agent entitled "A New Partnership Has Been Formed", the purpose of which is to show her how she can help her husband in the life insurance business (R. 53). From time to time, letters are sent to the wife, and a monthly publication for the employees is mailed to the agents' home so that the wife will have a convenient opportunity to read it (R. 53). The Company has determined that the presence of wives at the conventions keeps the meeting pitched on a high and attentive level (R. 53). The Managing Director of the Life Insurance Agency Management Association

testified that it was a wise business practice to have an agent's wife at the convention and to indoctrinate her with her prospects and responsibilities of the wife of an insurance agent (R. 69, 70).

Proceedings Before the Internal Revenue Service. Petitioners timely filed their joint Federal Income Tax Return for the calendar year 1956 (R. 5, 19, 22), and timely paid the tax thereon (R. 5, 19). Subsequently thereto, the Commissioner of Internal Revenue assessed a deficiency in income tax for such year against Petitioners in the amount of $126.90.

The entire expense attributable to Petitioners' travel to and from and their attendance at the convention, with the exception of $30.00 given to Petitioners as an allowance for unplanned meals in New York City, was paid directly by the Company to third parties (R. 36). The $30.00 was spent for the purpose for which it was given (R. 26). The parties have agreed that the total amount of travel and convention expense allocated to Petitioners was approximately $560.00 (R. 51).

The deficiency assessed against Petitioners resulted from the Commissioner's including in their income the amount of expenditures made by the Company and allocated to them as stated above, and by the further action of the Commissioner in disallowing to Petitioners a business expense deduction for an amount equivalent of the income with which they were charged.

Petitioners paid the assessed deficiency in income tax on September 8, 1958, together with the interest thereon, and timely filed a claim for refund, which was denied (R. 5, 19).

Proceedings Before the Courts Below. Petitioners instituted suit against Respondent on October 9, 1959 (R. 24) in the Federal District Court for the Northern District of Texas to recover the $126.90 in income tax, together with interest thereon in the amount of $10.19, for the calendar year 1956, which taxes were alleged to be illegally and erroneously assessed against and collected from Petitioners by the District Director of Internal Revenue for the district in which Petitioners reside (R. 5, 19). The August 31, 1960 (R. 4). The cause came on to trial before Honorable T. Whitfield Davidson, sitting without a jury, who, on September 28, 1960, entered judgment for Respondent (R. 81).

Petitioners filed due notice of appeal to the United States Court of Appeals for the Fifth Circuit (R. 82), and on June 27, 1961, that Court affirmed the judgment of the Trial Court per curiam, Judge Brown dissenting (R. 92-102). Formal judgment was entered by said Court on June 27, 1961 (R. 103). Petitioners filed a motion for rehearing on July 18, 1961 (R. 103-104), and the order denying the motion for rehearing was entered by said Court on July 28, 1961, Judge Brown again dissenting (R. 105). Petitioners filed in this Court on September 11, 1961, a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. This Court granted Certiorari on November 13, 1961 (R. 106).

SUMMARY OF ARGUMENT

I.

Justice Holmes, in *Towne v. Eisner*, *245 U. S. 418 (1918)*, remarked:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and context according to the circumstances and the time in which it is used."

Once again the Court is called upon to construe the restless word "income"; to resolve whether or not, under the Sixteenth Amendment and the taxing statutes enacted pursuant thereto, Petitioners realized income with respect to expenditures, incurred by the Company in sponsoring a convention of its agents, of which a stipulated amount was allocable to Petitioners. The intensely practical matter of taxation[1] is here concerned with an intensely practical aspect of contemporary business life—the company convention—and all its overtones of economic compulsion, modern management practices, business psychology and the like. It is in this setting that the color and context of the word "income" is sought.

While it is recognized that the Court, in specific situations, has accorded broad meaning to the word "income",[2] there exists an area wherein an employee may be the recipient of or enjoy something which, from the standpoint of classical or philosophical economics or, perhaps, in a very real sense,

[1] Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 74 L. Ed. 371, 50 S. Ct. 98 (1930).

[2] Comm'r v. Smith, 324 U. S. 177 (1945).

represents a gain or benefit to the employee, but he is not considered to be in receipt of taxable income. A careful analysis of the decisions and the logic of the tax law suggests that this condition is present when (i) the employer does not intend the thing provided to be additional compensation to the employee; (ii) there is no undeniable accession to wealth, clearly realized, over which the employee has complete dominion; and (iii) the dominant motive of the employer is to further his business and the thing provided is designed to accomplish that end. In other words, the revenue laws do not purport to tax what is akin to psychic income or the perquisites of employment.

In the case before the Court, the Company sponsored and paid for a convention of its agents because, in the judgment of its management based upon long-standing personal and industrywide experience, the business of the Company would be materially enhanced. The convention trip was not intended as compensation nor as a prize or award to Petitioners. Petitioners were compelled by the Company to attend the convention and participate in its activities, to reside in pre-selected hotel accommodations, and to travel (en masse with other agents and officers of the Company) in special trains. What was their undeniable accession to wealth over which they had dominion and control? Suppose Petitioners did not like train travel, New York or conventions. Would this affect the measure of their alleged income? The implausibility of evaluating degrees of pleasure incident to an

employer's business demands (and an employee's response thereto) isolates the error in treating the payment of the convention expenses as constructive income to Petitioners.

II.

If the Petitioners are not charged with gross income in this case, then the alternative argument of business expense is never reached, since the dollars claimed as a deduction obviously must first have been through the tax mill. On the other hand, if the expenditures made by the Company on behalf of Petitioners are included in their gross income, they should be allowed an ordinary and necessary business expense deduction for an equivalent amount. The statute provides that all ordinary and necessary traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business are deductible, and it is well-established that the cost of attending a professional or business convention falls within that category. In other words, it is thought to be both "ordinary" and "necessary" in business to attend conventions and to incur expenses in connection therewith. Petitioner, Rudolph, was engaged in the business of being an insurance agent, and he and his wife were away from home attending a convention of his employer's agents when the expenses in question were incurred.

Therefore, the ultimate inquiry is whether the dominant motive and purpose of Petitioners in attending the convention was one of business or pleasure. Were they in pursuit of Rudolph's business or only their own personal whims? In seeking the answer to this inquiry the business purpose of the Company, the industrywide experience, the subtle demands upon Petitioners, and the psychology of business practices all are pertinent and must be examined, for the subjective choice of Petitioners to attend was made in response to these external circumstances and pressures. It is the reason why Petitioners attended, not whether they enjoyed themselves, which is of vital concern.

In this case, Rudolph's agency contract was terminable at will, and he knew that the Company expected him and his wife to attend the convention. Refusal to attend without adequate reason would be tantamount to placing his economic security and his job on the chopping block. His decision to attend and bring his wife was a natural and prudent businessman's response to the demands of his employer. Moreover, the underlying business purpose of the Company was woven deftly into the fabric of the convention, from beginning to end. The group travel arrangements, formal business sessions, choice of speaker, planned entertainment and free time all were designed and intended to instruct, motivate, and encourage the agents and their wives in their business (and the business of the Company). By attending the con-

vention Petitioners participated in an activity which the Company's management, industry experts, and the agents themselves (those best able to judge) believe served a worthwhile business purpose, and to which the Company was willing to devote time, money and effort. Thus, the expenditures attributable to Petitioners were not only necessary, they were unavoidable, since the Company required that they attend the convention and determined the amount spent in their behalf. To assert (as Respondent would do) that Petitioners were away from home for personal reasons and not in pursuit of a business is to make a mockery of the historical reasons for company conventions and to disregard the uncontroverted testimony before the Court.

III.

If the Petitioners are charged with income in this case, the expenditures attribuable to Irma M. Rudolph are ordinary and necessary business expenses for the same reasons that the expenditures attributable to her husband are properly so classified. It is recognized that a wife's expenses on a business trip are deductible if her presence has a bona fide business purpose. What could be more bona fide than if an employer, for its own legitimate business reasons and without intent to compensate, requires that the wife of an employee be present at a convention sponsored by the employer.

ARGUMENT

I.

PETITIONERS DID NOT CONSTRUCTIVELY RECEIVE INCOME WHERE THEY ATTENDED A BUSINESS CONVENTION AT THE BEHEST OF THE COMPANY, THE PAYMENT OF THEIR EXPENSES WAS NOT INTENDED AS COMPENSATION, AND THE CONVENTION WAS ORGANIZED AND EXPECTED TO SERVE THE LEGITIMATE BUSINESS PURPOSES OF INSTRUCTING AND MOTIVATING THE EMPLOYEES OF THE COMPANY.

A. The Concept of a Non-statutory Exception to Gross Income.

Petitioners are cognizant of the broad sweep ascribed by the Court to the term "income" under the tax laws.[1] However, even those decisions which herald the pervasive definition of income in the same breath acknowledge that there may be certain exceptions thereto other than those specifically enumerated in the statute. For instance, in *Comm'r v. Smith, 324 U. S. 177 (1945)*, the Court said:

> "Section 22(a) of the Revenue Act is broad enough to include in taxable income any economic or financial

[1] Eisner v. Macomber, 252 U. S. 189, 64 L. Ed. 521, 40 S. Ct. 189 (1920); Old Colony Trust Co. v. Comm'r, 279 U. S. 716, 73 L. Ed. 918, 49 S. Ct. 499 (1929); Comm'r v. Smith, 324 U. S. 177 (1945); Comm'r v. Glenshaw Glass Co., 348 U. S. 426, 99 L. Ed. 483, 75 S Ct. 473 (1955); James v. United States, 366 U. S. 213, 81 S. Ct. 1052 (1961). Note that Section 22(a) of the Internal Revenue Code of 1939 included as income "gains or profits and income derived from any source whatever." Section 61(a) simplified the statutory language, and eliminated the portion quoted above. However, the amendment was not intended to affect the nature of statutory gross income. Sen. Rep. No. 1622, 83rd Cong., 2d Sess., p. 168. All references hereafter in the text are to the Internal Revenue Code of 1954, unless otherwise specified.

> benefit conferred on the employee *as compensation* (emphasis supplied), whatever the form or mode by which it is effected."

By this language the Court held that any economic or financial benefit conferred on an employee "as compensation" is income, and the form which such compensation may take is immaterial (unless specifically excluded by statute). However, the Court did *not* say that an economic or financial benefit *not* conferred on an employee as compenastion constitutes income.[4] The Court has also said, in *Comm'r v. Glenshaw Glass Co., 348 U. S. 426 (1955)*, that income encompasses

> "• • • undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."

Stated negatively, if there is no undeniable accession to wealth, if the taxpayer clearly realizes nothing over which he has complete dominion and control, then there may *not* be taxable income. This comports with the Court's view that "income" should be determined on a practical case by case basis.[5]

The conclusion may thus be drawn from these principles that an employee does not realize taxable income when he is the recipient of some benefit (as to which he had no discretion) conferred by his employer without intent to compensate, and the benefit conferred is something essentially subjective and ephemeral, not something which results in an undeniable accession to wealth over which the employee has

[4]The cases do recognize that income need not be earned, *i.e.*, that services need not be rendered. See, *e.g.*, Clarence K. Williams, 35 T. C. , No. 74 (1961). These decisions must be read in the light of others placing an outer limit on the scope of gross income.

[5]See General American Investors Co., Inc. v. Comm'r, 211 F. 2d 522 (2d Cir. 1954), *aff'd*, 348 U. S. 434, 99 L. Ed. 504, 75 S. Ct. 478 (1955).

complete dominion. In other words, the statute does not purport to tax, and the term "income" does not include, what may be called psychic income or the perquisites* of employment. This is in accord with the need for a workable system of producing revenue which does not indulge in the refinements of economists and lexicographers.† The problem is aptly described in *Simons, Personal Income Taxation 53 (U. Chicago Press 1938)*:

> "A similar difficulty arises with reference to receipts in the form of compensation in kind. Let us consider here another of Kleinwachter's conundrums. We are asked to measure the relative incomes of an ordinary officer serving with his troops and a *Flugeladjutant* to the sovereign. Both receive the same nominal pay; but the latter receives quarters in the palace, food at the royal table, servants, and horses for sport. He accompanies the prince to theatre and opera, and, in general—lives royally at no expense to himself and is able to save generously from his salary. But suppose, as one possible complication, that the *Flugeladjutant* detests opera and hunting.
>
> "The problem is clearly hopeless. To neglect all compensation in kind is obviously inappropriate. On the other hand, to include the perquisites as a major addition to the salary implies that all income should be measured with regard for the relative pleasurableness of different activities—which would be the negation of measurement. There is hardly more reason for imputing additional income to the *Flugeladjutant* on account of his luxurious wardrobe than for bringing into account the prestige and social distinction of a (German) university professor. Fortunately, however, such difficulties in satisfactory measurement of relative incomes do not bulk large in modern times; and, again, these elements

*Used here to mean "some advantage, privilege, or incidental benefit resulting from one's employment or office."

†Merchant's Loan & Trust Co. v. Smietanka, 255 U. S. 509, 65 L. Ed. 751, 41 S. Ct. 386 (1921).

of unmeasurable psychic income may be presumed to vary in a somewhat continuous manner along the income scale, * * *."

Similarly, Arthur J. Goldberg, then General Counsel of the CIO, said in a speech:[8]

"The line between (compensation and conditions of employment) is, perhaps, not susceptible of precise definition. The reason it is not is because the line is really an institutional and sociological one. It depends very much on what our current conception of the relative responsibilities of employer and employee happen to be. The question is whether the benefit in question is one which we regard as a proper responsibility which employers should supply for employees as a condition of employment wholly apart from the compensation for their work. And the answers to that question vary from time to time. To the extent that benefits are usually or normally provided by employers, even though they may involve a saving to an employee over alternative methods of providing this facility by himself, then, to that extent the provision of such benefits should not be considered as compensation to the employee but as the provision of improved conditions of work."

B. The Concept Recognized in the Law.

The analysis advanced above is borne out by the pertinent decisions, Congressional Committee reports, and the United States Treasury Regulations themselves. Section 119[9] pro-

[8] See Surrey & Warren, Federal Income Taxation Cases and Materials 106 (Foundation Press, Inc. 1955).

[9] Section 119 reads as follows:

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) In the case of meals, the meals are furnished on the business premises of the employer, or

(2) In the case of lodging the employee is required to use such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a state statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation."

vides, in effect, that the value of meals or lodging furnished to an employee by an employer for the convenience of the employer are excludable from income if the meals are furnished on the business premises or the lodging is required to be accepted as a condition of employment. Section 119 is a statutory recognition in a limited area of the underlying concept discussed herein, and Petitioners obviously do not contend that they fall within the ambit of its provisions.

However, prior to the enactment of Section 119, the taxability of meals and lodging furnished to employees turned on two points: (1) were the meals and lodging intended as compensation, and if not (2) were they furnished for the convenience of the employer. See Mim. 6472, 1950-1 Cum. Bull. 15. The cases and rulings held that meals and lodging not intended as compensation and meeting the convenience test did not constitute income to the employee. See *2 Mertens, Law of Federal Income Taxation § 11.16.* The judicial conclusions sanctioning an exclusion from gross income in the absence of specific statutory authorization are proper and just. Nor are such conclusions at odds with the fact that there is an element of gain to the employee in that he received sustenance and quarters which he otherwise would have had to supply for himself. He had nothing he could take, appropriate, use and expend according to his own discretion; rather, the ends of the employer's business dominated and controlled, just as in the furnishing of a place to work and in the supplying of tools and machinery to work with. That personal needs or wants of the employee were

satisfied was merely incidental to the dominant business purposes of the employer.[10]

Thus, Section 119 codified the case law, and modified it to the extent of eliminating the fact question of intent to compensate as a determinant where meals and lodging are furnished in kind.[11] But it did not destroy the fundamental rationale of these earlier decisions as precedent in related or analogous areas; indeed, the committee reports and the regulations under Section 119 acknowledge that today cash allowances for meals and lodging are includible in income *only to the extent that such allowances represent compensation.*[12]

Therefore, it cannot be gainsaid that the courts, Congress, and the Treasury have conceded some benefits conferred upon an employee do die beyond the framework of taxable income. Are there others? What about so-called "fringe benefits" such as use of a library, swimming pool or gymnasium, parking facilities, free medical services, discounts on goods or services, airconditioning, executive offices, special instruction or

[10]Arthur Benaglia, 36 B.T.A. 838 (1937) (acq.). The employee has no unfettered command over the thing. Corliss v. Bowers, 281 U. S. 376 (1936).

[11]Boykin v. Comm'r, 260 F. 2d 249 (8th Cir. 1958); Wolfe v. Comm'r, 59-2 USTC 9558 (4th Cir. 1959). Rev. Rul. 59-307, 1959-2 Cum. Bull. 48. *Cf.* Rev. Rul. 60-348, 1960-2 Cum. Bull. 41 (withdrawing an earlier ruling requiring the inclusion in gross income of the value of meals and lodging furnished to families of resident faculty members of a boarding school as well as the value of meals and lodging furnished for any period during which students were not in residence).

[12]Sen. Rep. No. 1622, 83d Cong., 2d Sess., p. 190 (1954), wherein it is stated: "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals and lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation."

Reg. § 1.119-1(c)(2) specifies: "Cash allowances for meals or lodging received by an employee are includable in gross income to the extent that such allowances constitute compensation."

training (on or off the employer's premises) for the purpose of enabling the employee to better perform his job responsibilities, and the myriad of other incidental benefits or privileges that go with one particular job or another.[13] Section 3401 (relating to collection of income tax at source) provides that the term "wages" includes "the cash value of all remuneration paid in *any* (emphasis supplied) medium other than cash". Nevertheless, Reg. § 31.3401(a)-1(b)(10) prescribes an exception:[14]

> "Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called 'courtesy' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as wages subject to withholding if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment or efficiency of his employees."

These benefits do not and should not constitute income pro rata to the employees generally, or to those employees who

[13]See Life Magazine (September, 1952), under the caption "Life Goes to Houston's Paradise for Office Girls", wherein the following example is offered:

> "Oveta Smith is an 18-year-old Houston girl, just out of high school, who types and knows some shorthand. In the competitive world of local business, where booming oil companies set the wage scales, she was offered $180 a month by a maritime insurance firm for a clerical job. She turned it down because she prefers making $140 in her present job with the Prudential Life Insurance Company. Her reasons are illustrated on these pages. When Prudential built its new skyscraper it decided to fight the problem of labor turnover without raising its conservative wage level. The Company piled on 'fringe' benefits—not only the usual life insurance and medical checkups, but such unprecedented luxuries as a free swimming pool, free books, free lunches, free tennis courts—in surroundings suggestive of spacious and graceful living. As in the case of Oveta, the system has worked well. So well, in fact, that the vice-president who dreamed up the scheme recently was able to boast that the company didn't have a clerical job open in Houston."

[14]See also Reg. 106, § 402.227; Reg. 107, § 403.227.

avail themselves of one or more. The value thereof is essentially subjective and incapable of measurement, the employees lack discretion or control over their selection, and the underlying objective of the employer is not to compensate the employee but to further the business of the employer. At one end of the spectrum is that which is intended as compensation (in whatever form paid) and therefore represents taxable income; at the other end of the spectrum is that which is a gift as defined by the Court[15] and therefore is nontaxable. Clearly, these fringe benefits would not satisfy the "detached and disinterested generosity" required of a gift, and yet they are nontaxable. They fall somewhere between compensation and gift; somewhere in that nontaxable "twilight zone" which has never been precisely articulated but which is present in all of the decisions and the law.

C. The Concept Applied to the Facts.

Hence we come to the point of applying these principles to the facts before the Court. The District Court held, and the Court of Appeals affirmed, that the convention trip was in the nature of a bonus or compensation, despite uncontroverted testimony to the contrary by the Company's officers and by an independent expert in the field. There was ample evidence before the courts that the Company's decision to hold the convention was based upon sound business objectives, long substantiated by Company and industrywide experience,[16] to

[15]Comm'r v. Duberstein, 363 U. S. 278, 80 S. Ct. 1190 (1960).

[16]Conventions of life insurance agents have been prevalent since 1924. See Report No. 15, Life Insurance Sales Research Bureau (November 1924), Appendix B, p. 57. It is intriguing to note that attribution of income to the agents appears never to have been raised by the Internal Revenue Service despite the elapse of forty years of revenue administration.

instruct and motivate its agents, build esprit de corps, enhance the "family" image of the Company, create interest in sales promotion, and in general further the business of the Company and the agents. The time, effort and planning involved in an undertaking of this sort belie a mere intent to compensate or pay a bonus; the reasons for insurance company conventions are found in much more complex considerations: the nature of an agents' job; energetic competition in the industry; modern business psychology, and other valid business reasons. Respondent would make much of the fact that the agents invited were selected on the basis of production, but this was nothing more than an intelligent and practical method for choosing the agents who would most benefit by the convention.[17] Every sizeable business organization must have some criterion by which to judge the work of its employees and by which to determine those upon whom special training and motivation will be focused. Business does not operate like a school for exceptional children where special attention is devoted to the ones displaying the least aptitude. Obviously, success is recognized. But the convention is not, and was not intended, as a quid pro quo for production.

[17] "What type of person are you going to invite to your conference? Can you draw up a specification of the sort of person you believe will contribute the most"

"What you want is a group of experienced people with keen minds, who are determined to find out all they can about the problem and contribute on the basis of that knowledge to its solution." The Royal Bank of Canada Monthly Letter, Vol. 39, No. 2, page 1 (February 1958), Appendix B, p. 57.

Kenneth B. Skinner, Vice President and Agency Director of the Company, testified (R. 61):

> "Yes, we select the men to attend a convention based upon their proven abilities as well as men showing an aptitude for the business. The amount of business they have written in the past is an important yardstick in our judgment of measuring whether or not they are doing a good job and will continue to do one."

The Court recently had occasion to reiterate the importance of looking to the intent of the payor or transferor in determining the taxability of the recipient. The question in *Commissioner v. Duberstein*, 362 U.S. 278, 80 S. Ct. 1190 (1960), was whether a Cadillac automobile received by a taxpayer from a business associate constituted a gift or taxable compensation. In rejecting the Government's insistence on a new and broad test, the Court said:

> "We take it that the proper criterion, established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. Further than that we do not think we can profitably go."

The same criterion is applicable here. The dominant reason of the Company in paying the convention expenses of Petitioners is of vital significance, yet the Court of Appeals apparently dismissed this fact without consideration. Unless the uncontradicted testimony before the Court is to be tossed aside as meaningless, a determination must be made as to whether or not the payment of Petitioners' convention expenses constitutes income to them *notwithstanding the absence of any intent to compensate*.

The Court of Appeals ostensibly rests its decision as to the receipt of gross income on the generalization that "receipt by a taxpayer of benefits in a form other than cash may constitute income to him",[15] and on the conclusion that Section 119 is inapplicable. The latter ground for decision may be disregarded, since it is obviously predicated on the mistaken impression that Petitioners claim the coverage of Section 119.

[15] See Patterson v. Thomas, 289 F. 2d 108, 111 (5th Cir. 1961).

On the other hand, the generalization about the receipt of income in kind glosses over the surface and skids to a stop short of the true issue.

As evidenced by the Record, the Petitioners were compelled to go to a company convention; they acted not as a matter of free and independent choice, but in response to the Company's demands. The Company made all arrangements for the convention, and the Petitioners could exercise no discretion in this regard. They were told when to go, what trains to travel on, what hotel and in what room to stay, what to do and when to return. What was their undeniable accession to wealth over which they had dominion and control? Suppose that the Petitioners did not like train travel, New York or conventions.[11] Would the degree of pleasure which they experienced affect the amount of income with which they were charged, and should they be able to recognize a loss if their state of mind was one of actual displeasure? Absurd? Yes. But this is, in essence, the consequence of holding Petitioners to be in receipt of income by virtue of the payment of their convention expenses.

The situation before the Court should be distinguished from a case where an employee is required to travel for his employer, may select his mode of travel, accommodations, etc. and then is reimbursed for his expense on behalf of the employer. The inclusion of the reimbursement in the employee's gross income[12] may be justified on the ground that

[11] C. J. D. Rudolph testified (R. 43): "Whenever I take a trip I like to get away from it all, not have any schedule and do as I please."

[12] Reg. § 1.162-17(b). Note that if expenses are equal to reimbursements, the employee need not report on his tax return reimbursements for travel, transportation, entertainment, and similar purposes paid or incurred by him solely for the benefit of his employer (if he is required to account and does account to his employer for same).

he had sufficient dominion, control and discretion over the conduct of his affairs (*i.e.*, selection of his mode of travel, accommodations, etc.), so that the reimbursement of those costs should be included in the first instance in his gross income, even though he is allowed an offsetting business expense deduction. No such dominion, control or discretion is present here; the only measurement of gain would be the state of mind or psyche of Petitioners, and as, Simons says, this is the negation of measurement.

It is respectfully submitted, therefore, that Petitioners received nothing which constitutes "income" within the meaning of the statute or the Constitution.

II.

IF THE PAYMENT OF EXPENSES ATTRIBUTABLE TO PETITIONERS' TRAVEL TO AND ATTENDANCE AT THE BUSINESS CONVENTION OF THE COMPANY CONSTITUTES TAXABLE INCOME TO PETITIONERS, THEN AN EQUIVALENT AMOUNT IS DEDUCTIBLE BY THEM AS AN ORDINARY AND NECESSARY BUSINESS EXPENSE.

If Petitioners are not required to include in gross income the convention expenses incurred by the Company applicable to them, then their alternative argument is never reached. However, a common thread runs between the argument against constructive attribution of income and the argument in favor of business expense. The same basic facts that lend support to an exclusion from income also, when turned around, confirm the presence of legitimate business expenses; that is, the business purpose of the convention and the neces-

sity for Petitioners to attend in response to the command of the Company.

A. Legislative History of the Statute.

§ Section 63(a), contained in Part I, Subchapter B, Chapter 1, Internal Revenue Code of 1954, specifies that "the term 'taxable income' means gross income, minus the deductions allowed by this chapter * * *." Section 161, contained in Part VI, Subchapter B, of Chapter 1, provides that in computing taxable income under section 63(a) "there shall be allowed as deductions the items specified in this part * * *." Section 162(a) enumerates certain trade or business expenses which fall within the foregoing provisions:

> "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> "(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business;"

The predecessor of Section 162 first appeared in Section II, B of the Tariff Act of 1913:

> "That in computing net income for the purpose of the normal tax there shall be allowed as deductions: First, the necessary expenses actually paid in carrying on any business, not including personal, living or family expenses; * * *."

Little or no change was made[21] until the Revenue Act of 1918 which extended the deduction for ordinary and neces-

[21] Clerical changes were made by Section 5(a) of the Revenue Act of 1916, and by Section 1201(1) of the Revenue Act of 1917.

sary expenses in Section 214(a) to those "paid or incurred", and shifted the prohibition against deducting personal, living or family expenses to Section 215(a).[22] The Revenue Act of 1921 added for the first time the language which is now paragraph (2) of section 162(a). The House Report[23] said of the amendment:

> "Section 213 [section 214 of the Senate version] would permit (in the computation of net income) the deduction of all traveling expenses incurred in the pursuit of a trade or business instead of the more limited deduction for such expenses allowed under the present law."

The Senate Report[24] noted that "the deduction for business expenses is *extended* (emphasis supplied) to include all traveling expenses incurred while away from home in pursuit of a trade or business." Thus, it is a fair inference to draw that whatever the law was previously, the Revenue Act of 1921 intended to broaden the deductibility of business expenses, and any construction of the statute should be made in light of this Congressional intent. Although clerical changes have been made,[25] the language of the Revenue Act of 1921 has been carried over into section 162(a)(2).

Congress has not thus far seen fit to restrict the deductibility of travel expenses. In 1959, Senator Clark proposed an amendment[26] to the Tax Rate Extension Act of 1959, which, among other things, would have disallowed deductions for

[22] Now Section 262.

[23] H. R. No. 350, 67th Cong., 1st Sess., p. 11.

[24] Sen. Rep. No. 275, 67th Cong., 1st Sess., p. 14.

[25] The Revenue Act of 1928 consolidated the prior provisions of Section 214(a)(1), relating to individuals, and Section 234(a)(1), relating to corporations, into a single Section 23(a).

[26] S. 2040, to amend H. R. 7523, 86th Cong.

entertainment at public places and travel costs to conventions outside the United States.[27] The amendment was defeated in the Senate Finance Committee. Later, Senator Clark offered an amendment on the Senate floor to accomplish the same basic objectives, and this also was rejected.[28] Two aspects of this legislative proposal are pertinent. First, the restrictions were aimed, in part, at types of activity which might involve pleasure incident to some business purpose, and the rejection of the proposal is significant. Second, the proposal would have disallowed deductions for travel to conventions outside the United States, thereby according left-handed recognition to the legitimacy of travel expenses to conventions inside the United States.

Since 1924 the Treasury regulations[29] under Section 162 and predecessor provisions have stated generally that deductible business expenses include "ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business", and the Court has amplified this by saying that there must be a "direct and proximate" relationship before the expense is deductible.[30] However, the specific regulation pertaining to travel expenses under

[27] *Query*: The American Bar Association Convention to London, England.

[28] 105 Congressional Record 11897, 11900.

[29] Reg. 65, Art. 101; Reg. 69, Art. 101; Reg. 74, Art. 121; Reg. 77, Art. 121; Reg. 86, Art. 23(a)-1; Reg. 94, Art. 23(a)-1; Reg. 101, Art. 23(a)-1; Reg. 103, § 19.23(a)-1; Reg. 111, § 29.23(a)-1; Reg. 118, § 39.23(a)-1; Reg. § 1.162-1(a).

[30] Kornhauser v. United States, 276 U. S. 145 (1927); Bingham's Trust v. Comm'r, 325 U. S. 365, 65 S. Ct. 1232, (1945). *Cf.* H. R. No. 2333, 77th Cong., 2d Sess., p. 75 (1942), wherein the Ways and Means Committee (discussing the predecessor of Section 212) noted that the "expenses • • • must be ordinary and necessary • • • and must bear a reasonable and proximate relation to the production or collection of income • • •."

section 162(a)(2) has been expanded considerably. Reg. §1.162-2 was adopted by Treasury Decision 6291, approved April 3, 1958, so that the Petitioners are actually governed by the regulation pertaining to the year 1956.[31] Reg. 118, §39.23(a)-2(a), then in force, provided simply:

> "Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses."

However, in disallowing Petitioners a deduction for their convention expense, Respondent ostensibly relies upon an interpretation of the law consistent with the newly-promulgated regulations. Therefore, when considering the application of the regulations to Petitioners, we shall address the discussion to Reg. §1.162-2.

B. Refinement of the Issues.

Any traveling expense to be deductible must be reasonable,[32] and there is no dispute in this case that the expenditures attributable to Petitioners are reasonable. The statute also requires that the expenses be incurred "away from home", and it is apparent that this test is satisfied. Thus, the broad issues are whether Petitioners paid or in-

[31] See Section 7807, for the rules regulating to stop-gap regulations. The specific regulation pertaining to travel expenses first appeared in Reg. 62, Art. 101(a), and the same basic language was carried over into Reg. 118, § 39.23(a)-2(a).

[32] Comm'r v. Flowers, 326 U. S. 465, 90 L. Ed. 203, 66 S. Ct. 465 (1946).

curred "ordinary and necessary"[13] expenses "in the pursuit of a trade or business."

At the outset, it should be noted that an employee is considered to be engaged in a trade or business,[14] and that Rudolph was carrying on the business of being an insurance agent. The question may therefore be restated as follows: did Petitioners attend the convention in pursuit of Rudolph's business as an insurance agent and employee of the Company, and, if so, were their expenses in connection therewith "ordinary and necessary"? "Life in all its fullness must supply the answer to this riddle."[15]

"Ordinary" expenses are not necessarily habitual or normal expenses in the sense that the same taxpayer will have to make them often. *Welch v. Helvering, 290 U.S. 111, 54 S. Ct. 8 (1933); Robinson Land & Lumber Company of Alabama v. United States, 112 F. Supp. 33 (S.D. Ala. 1953); Canton Cotton Mills v. United States, 94 F. Supp. 561 (Ct. Cl. 1951).* The term "ordinary and necessary expense", however, must be given its natural and common connotation. *Tinkoff v. Commissioner, 120 F. 2d 564 (7th Cir. 1941).* An ordinary expense may be one which happens but once in the taxpayer's lifetime if it is a common or frequent occurrence in the type of business in which the expenses are incurred. *Deputy v. DuPont, 308*

[13] Note that the regulations speak of "reasonable and necessary" traveling expenses, but it is not believed that this variation is significant.

[14] See I.T. 4012, 1950-1 Cum. Bull. 33; Rev. Rul. 190, 53-2 Cum. Bull. 302, 305; Rev. Rul. 60-16, 1960-1 Cum. Bull. 58; Noland v. Comm'r, 269 F. 2d 108 (4th Cir. 1959); Reg. § 1.162-2(d). See also 4 Mertens, Law of Federal Income Taxation § 25.08, note call 62.1. Although C.J.D. Rudolph is referred to for convenience as an employee of the Company in the sense that he is employed on a continuing basis as a commissioned agent, his legal status is that of an independent contractor.

[15] Welch v. Helvering, 290 U. S. 111, 54 S. Ct. 8 (1933).

U. S. 488, 60 S. Ct. 363 (1940). The test of a deduction made as an ordinary and necessary expense in carrying on a trade or business is said to be its natural normality and soundness as a business expenditure, in both nature and amount, by general commercial standards, in practical application to the specific situation. *Bryers v. Commissioner, 199 F. 2d 273 (8th Cir. 1952).* Whether an expenditure is both ordinary and necessary will depend upon whether the "average hard-headed businessman" might have made the expenditure.[38] The evidence of customs and actions of organized professional organizations is admissible on the issue of whether certain expenses of a member of that profession at a given time and place are deductible as an ordinary and necessary expense. *Lilly v. Comm'r, 343 U. S. 90, 72 S. Ct. 497 (1952).*

There are many cases which establish that expenses incurred in connection with attendance at professional, business or technical conventions are an "ordinary and necessary" incident of carrying on or pursuing a trade or business, and therefore constitute allowable deductions under section 162 (or its predecessors). Deductions have been allowed to: clergymen attending a church convention;[39] lay member of a church attending a church convention;[40] person attending American Red Cross Convention;[41] lawyer attending tax institute;[42] employee attending convention of related

[38] 4 Mertens, *supra* § 25.09 at 34.

[39] Marion D. Shutter, 2 B.T.A. 23 (1925).

[40] Rev. Rul. 58-240, 1958-1 Cum. Bull. 141.

[41] Henry Carton, 30 T.C. 28 (1958).

[42] Caughlin v. Comm'r, 203 F. 2d 307 (2d Cir. 1953); Bistline v. United States, 145 F. Supp. 802 (D. Idaho 1956). See also Charles O. Gunther, Jr., 1954 P-H T.C. Memo., dec. 54,287.

business group;[41] teachers attending conventions;[42] secretary attending convention of National Secretaries Association;[43] lawyer attending conventions and meetings;[44] university professor attending scientific convention;[45] insurance agent away from home on business;[46] professional cartoonist attending political convention to gather material;[47] physicians attending meetings of medical societies;[48] representatives to annual conventions of trade associations;[49] representatives to the conventions of the United States Chamber of Commerce;[50] furniture store sending its buyers to annual furniture mart;[51] and employees sent to refresher courses to become more acquainted with new processes in the industry.[52]

The instant case is unique and differs from those cited above in that the purpose of the convention was to bring together the scattered employees of a single large business concern rather than independent members of a particular profession or vocation or people having some common but

[41] L. F. Ratterman, 1948 P-H T.C. Memo., Dec. 48,130, *aff'd without opinion*, 177 F. 2d 204 (6th Cir. 1949).

[42] I.T. 3448, 1941-1 Cum. Bull. 206.

[43] Rita N. Callinan, 1953 P-H T.C.M., dec. 53,055.

[44] Wade H. Ellis, 15 B.T.A. 1075, *aff'd*, 50 F. 2d 343 (1929).

[45] Alexander Silverman, 6 B.T.A. 1323 (1927).

[46] Summerour v. Allen, 99 F. Supp. 318 (M.D. Ga. 1951).

[47] J. N. Dowling, 4 B.T.A. 499 (1926).

[48] Wolfe v. McCaughn, 17 AFTR 1007 (E. D. Pa. 1933); Robert C. Doffey, 21 B.T.A. 1242 (1931); Ray Upham, 16 B.T.A. 950 (1929); J. Bentley Squire, 13 B.T.A. 1233 (1928); Cecil M. Jack, 13 B.T.A. 726 (1928).

[49] I.T. 2602, 1931 Cum. Bull. 130.

[50] Letter Ruling signed by C. R. Nash, in reply to a letter dated December 22, 1926.

[51] Finkenburg's Sons, Inc., 17 T.C. 973 (1952).

[52] Pacific Grape Products Company, 17 T.C. 1097 (1952).

otherwise unrelated business interest."[53] This is the first time (together with *Patterson v. Thomas*, *supra*), that such a convention has been subject to analysis by this or any other court with reference to the "ordinary and necessary" requirement for business deductions.[54] However, since 1924 life insurance companies have almost universally sponsored conventions of the type here involved, based upon the business decision that the agents, and thereby the companies, benefit from the knowledge and motivation derived by the agents from the convention.[55]

There is no valid reason to differentiate between the conventions involved in the cited decisions, and a convention of the employees of a single large business concern, such as in the instant case. If the Petitioners attended the convention

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[53]See Rev. Rul. 59-316, 1959-2 Cum. Bull. 57, which suggests that a taxpayer claiming a deduction for expenses incurred in connection with attending a convention must show that he attended to further his own business. *Cf.* Rev. Rul. 60-16, *supra* note 33, wherein it is indicated that an employee may deduct in computing adjusted gross income the expenses which he incurs in the performance of his services as an employee in attending a business convention.

See also Reg. §1.162-5, which recognizes that an employee's education expenses (including, presumably, travel incidental thereto) in order to meet the express requirement of his employer are deductible:

> "(a) Expenditures made by a taxpayer for his education are deductible if they are for education (including research activities) undertaken primarily for the purpose of:
>
> * * * * *
>
> "(2) Meeting the express requirements of a taxpayer's employer, or the requirements of applicable law or regulations, imposed as a condition to the retention by the taxpayer of his salary, status or employment."

[54]The Commissioner of Internal Revenue recently announced that he acquiesced in the deduction of expenses incurred by individuals in attending conventions of the National Association of Internal Revenue Employees (a convention of employees of a single organization). CCH Fed. Tax Serv., Current Report No. 23, April 19, 1961. The Court of Appeals ascribes some nonbusiness connotation to the fact that the convention was of the employees of a single employer. However, the more logical reaction would be that the converse is true.

[55]See Life Insurance Sales Research Bureau, Report No. 15 (November 1924), Appendix B, p. 57.

for business reasons—that is, if they were in pursuit of a trade or business—their expenses were as "ordinary and necessary" as those of the taxpayers in any of the cited decisions.

C. Petitioners Attended the Convention for Business Reasons.

The ultimate issue, therefore, is the dominant motive and purpose of the Petitioners in attending the convention. Did they attend primarily for reasons of business or personal pleasure? To state the issue is virtually to assume the answer, since both motive and purpose are apparent when an employee acts in deference to the demands of his employer. Nevertheless, the issue must be explored and the facts related to the regulations upon which Respondent depends. Reg. §1.162-2(d) states that:

> "Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible."

Note that the test of deduction is made the sufficiency of relationship between the taxpayer's trade or business and his attendance at the convention so that his business is benefitted or advanced by such attendance. In requiring an accomplished benefit or advancement, the regulations probably go beyond anything warranted by the statute. Suppose an employer instructs an employee to attend a convention. *Query:* the relationship between the employee's business (of being an employee) and the convention is demonstrable, but does the negative benefit of not losing his job suffice under the regulations?

The specific regulation pertaining to conventions must be read together with Reg. §1.162-2(b)(1), relating generally to travel expenses:

> "If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible."

This provision permits deduction of travel expenses to and from a destination only if the trip is "related primarily" to the taxpayer's trade or business. It is not known whether this primacy test is the same as the "sufficient relationship" test specified in Reg. §1.162-2(d), and an equally serious

objection may stem from the criterion employed by Reg. §1.162-2(b)(2) for determining whether a trip is related primarily to business or is primarily personal:

> "Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary."

If the trip would not have been undertaken in the first instance were it not for the business reason, the relative times spent at the point of destination on business or personal affairs should be immaterial to the deductibility of expenses of travel to and from such destination.

It cannot be questioned that the formal sessions of the convention bear a direct and proximate relationship to Petitioners' business, since the affairs of the Company and the business of a life insurance agent were the subject matters of those sessions. However, in disallowing a deduction to Petitioners on the ground that the trip was primarily personal Respondent, and both the District Court and the Court of Appeals, stressed the relative times spent in formal session, travel and other activities and the fact that the convention was held in New York.[34] There are two fundamental

errors in the rationale of the lower courts and the theory of the regulations:

First, emphasis upon the relative times spent in planned entertainment, informal activities, and formal business sessions (as if this breakdown was conclusive evidence of an overriding non-business purpose) ignores the historic reason for the convention, the psychological factors in business motivation, the industrywide experience, etc.

Second, regardless of the nature of the activities at the convention (except as they may bear on the question of whether the whole episode was a sham [and in this case, Respondent concedes the bona fides of the convention (R. 67)]), the fact remains that Petitioners were required by the Company to attend and participate. Everything they did in response to the Company's demands, therefore, had a legitimate purpose.

1. *There is no valid basis for distinguishing between travel time and the various activities of the convention as to their business purpose.*

The Court of Appeals asserts that the issue of deductibility must be determined solely from the standpoint of the taxpayers. This is certainly true in the sense that the taxpayers (Petitioners) are the ones claiming the deductions. But the determination cannot be made in a vacuum. This is not a case where the Petitioners embarked on a pleasure jaunt independently of any planned program and at their destination inci-

[58]But *cf.* News Release, IR-394, August 3, 1961, 4 P-H Fed. Tax Serv., par. 32,375, wherein it was stated: "He [the Commissioner] said an analysis of a large group of cases from all parts of the country involving a variety of travel and entertainment expenses did not reveal that any expenses were disallowed merely because of the site of a convention or meeting. * * *."

dentally engaged in business. The Petitioners had no discretion as to the mode and time of transportation, their accommodations or the activities of the convention. Since the Petitioners were the conduit through which the business purpose of the Company was expressed, that same business purpose should be attributed to Petitioners.

For instance, the Petitioners spent almost five full days in enforced and close companionship with other agents and officers of the Company on specially chartered trains, during which time the life insurance business was the principal topic of conversation. This is exactly what the Company expected and intended. It was not mere happenstance that the Company *required* all those attending the convention to travel together. Travel under these circumstances would appear to have greater business substance than unplanned travel alone on some commercial carrier, yet Respondent seeks to disallow the travel expense as being primarily personal.

Likewise, the time spent in informal activity did not detract from the business character of the convention. Although the formal meetings lend continuity to the convention and obviously play an integral part in the instruction and motivation of the agents, perhaps the most invaluable lessons are learned through the give and take of casual conversation among agents. When lawyers get together they talk law; when doctors get together they talk medicine; when insurance men get together, particularly under the circumstances here involved, they talk insurance. Every lawyer knows that the principal benefit of attending a Bar Convention is not derived from what formal lectures are scheduled but rather

from the personal relationship among fellow members of the Bar—talk of a new case, an unusual agreement; talk of common problems; talk about economics of the profession. This was part of the stimulus which the Company wanted to provide. This was the very objective which, through balanced programming, the company desired to achieve.[37] From the moment that the agents and officers of the Company, and their respective wives, boarded the train, to the moment that they returned to Dallas, a dominant business purpose was interwoven into all their activities. The exchange of ideas and methods in informal conversation was as much a part of the plan as the formal meetings.

2. *Because Petitioners were compelled by the Company to attend the convention, all their actions (and the expenses incurred in connection therewith) were for a legitimate business purpose directly and proximately related to Rudolph's business.*

It is one thing to characterize a particular activity as being essentially personal or for business when viewed from the standpoint of preconceived contemporary ideas where such activity is undertaken voluntarily by the taxpayer. It is an entirely different matter when the activity in question is undertaken not voluntarily but as a matter of absolute business compulsion. In other words, it is *why* Petitioners attended, not whether their activities were abstractly pleasur-

[37] Entertainment at a convention is based upon the realization that the delegates are human beings and not mere mechanical cogs in the Company's machine. As such it has a place in every convention, regardless of size. See Report No. 15, Life Insurance Sales Research Bureau (November, 1924), Appendix B, p. 57.

able or whether they enjoyed themselves, which is of vital concern."

For example, suppose an employer orders his employee to attend a convention (or to do any number of things which *might* involve some aspect of pleasure to the employee) and to pay his expenses out of his own pocket. The employee has two alternatives: he can comply with the demand of his employer, or he can refuse to comply and risk the loss of his job. If the employee chooses the sensible course and attends the convention, the fact that he enjoyed himself (or, for that matter, did not enjoy himself) is totally irrelevant to the tax consequences of the expenses incurred, *because his reason for going is singularly and directly related to his business.*

Obviously, if the employer and employee got together and cooked up a scheme to convert a personal expense of the employee into a business deduction, the legitimacy of the deduction could and should be questioned. But in the face of an honest and purposeful business decision, it seems undeniable that the expenses of the employee are directly, proximately and inextricably related to his business.

In the instant case, Rudolph's agency contract was terminable at will, and he knew that the Company expected him to

"The Commissioner has said that "his investigators have launched 'no special drive' against expense account deductions claimed by convention-goers," and that an expense deduction won't be thrown out just because a taxpayer attends a convention in a resort area. He said such deductions are legal if the convention-goer sticks mainly to business matters, no matter how pleasant the surroundings. "Nobody's ever questioned whether you're enjoying yourself at a convention," he declared. "I hope the law is never administered on that basis." See Wall Street Journal, September 29, 1961.

attend the convention. Refusal to attend without adequate reason would be tantamount to placing his economic security and association with the Company in jeopardy. The command of the Company need not be proclaimed as an edict for the meaning to penetrate; the ways of modern business are more subtle, but no less effective. Petitioners decision to attend was a natural and prudent businessman's response to the implicit, but very real, coercion of the Company. What more does the law demand? What is the meaning of the terms "ordinary and necessary", if the actions of Petitioners be not so? As Honorable John R. Brown said in dissent—

> "In a real and vital sense the money is spent for business and business reasons only. It is indispensable. What is indispensable is certainly ordinary and necessary."

Certainly what is indispensable to his business is in pursuit of his business. If the management of a successful company believes that is the best way to further its business, and if the agents attend the convention not only because of the implied command but also because their own business is furthered, then the courts should not strike down the decision of management and reasonable business men in order to substitute that of their own—particularly when the decisions to hold and attend conventions have been accepted for thirty years or more by a nationwide industry as a valuable method

of promoting their business, instructing their agents, and assuring better service for policy holders."

It is respectfully submitted, therefore, that Petitioners should be allowed an ordinary and necessary business expense deduction, if they are charged with income in the first instance because of the payment of their convention expenses.

III.

IF THE PETITIONERS ARE CHARGED WITH INCOME IN THIS CASE, THE EXPENDITURES ATTRIBUTABLE TO IRMA M. RUDOLPH, AS WELL AS THOSE ATTRIBUTABLE TO HER HUSBAND, ARE DEDUCTIBLE AS ORDINARY AND NECESSARY BUSINESS EXPENSES.

The convention expenditures attributable to Irma M. Rudolph are ordinary and necessary business expenses for the same reasons that the expenditures attributable to her husband are properly so classified. It is recognized that a wife's expenses on a business trip are deductible if her presence has a bona fide business purpose, see U. S. Treas. Reg. 1.162-2(c) (1954), and this determination must be made in light of all the facts bearing upon her presence. It is evident

[9]The tax treatment accorded the agents is very material to the Company's objective in sponsoring the convention. The Company has concluded, over long years of experience, that its conventions serve an important business purpose, and neither the Company nor the agents consider the conventions to be a vacation. If the agent is to be taxed for the convention expenses allocable to him, he would likely be of the frame of mind to treat the convention as a vacation and rebel against or disregard the regimentation and basic functions so carefully planned by the Company to meet its objectives. In other words, the business purpose of the Company will be seriously impaired by the imposition upon the agents of a tax based upon conclusions of fact contrary to the expressed intent of both the Company and the agents. This would seem an unwarranted erosion of justifiable business prerogative.

from the testimony before the Court (R. 53), that the Company makes a conscientious and sustained effort to bring the agents' wives into the Company family, and to advise them in a practical manner about the ways they may help their husbands. The Company's efforts in this behalf were not casual and offhand, but were deliberate and carefully considered to achieve their purpose. This has been true on an industrywide basis for years antedating the advent of high taxes! The Company expected Rudolph's wife to attend, and this expectation was not taken lightly by him or the other agents.

If an employee's wife attends a business convention under the guise of a business purpose when in reality the trip is personal, her expenses should not be deductible. But where the Company commands that a wife attend, not for the purpose of offering disguised compensation but for its own legitimate business reasons, and the employee acts in response to that command, the wife's expenses are and should be deductible as ordinary and necessary business expenses."[*]

CONCLUSION

The current controversy about expense account abuses and the efforts of the Treasury to eliminate same are common

[*] See Remarks by Joseph E. Tansill, 14 Journal of Taxation 201, 202:
"Expenses of wives of employees paid by the employer, in attending conventions, * * * seem to constitute another area of spotty enforcement when various parts of the country are contrasted with each other. There are variations among agents in the same district, of course, so that complete uniformity does not exist, but in general it appears that the Middle West has been more vigorous than some other areas on the question of the expense account problems, including wives expenses. *Litigation may ultimately be required to settle these questions*, where the wife's presence is a 'command performance' * * * or where the wife does in fact perform an important function. * * * Modern corporate philosophy regards a key employee's wife as an indispensible member of the team, and many a promising career has been blocked because the individual's wife doesn't measure up."

knowledge.[1] But any inclination to lump life insurance conventions indiscriminately in the category of activities which are criticized by the Treasury would appear to be dangerous and misguided. The holding of life insurance conventions long preceded the era of high taxes, and their purpose is rooted in legitimate and sound business decisions, not tax avoidance. It seems unrealistic, in the inception, to visit upon the Petitioners constructive income predicated essentially on an assumed state of mind. It seems an absolute nullification of the "ordinary and necessary" formula in the statute to disallow Petitioners a business expense deduction if income is, in fact, imputed to them. Perhaps the Congress will determine that the statute produces results undesirable from a socio-economic viewpoint or impossible of orderly administration, and should be changed. Nonetheless, under present law the deduction is proper and should be allowed. The judgment of the court below should be reversed.

Respectfully submitted,

FELIX ATWOOD,
RICHARD A. FRELING, of
TURNER, WHITE, ATWOOD,
MEER & FRANCIS,
1900 Mercantile Dallas
Building,
Dallas 1, Texas,
Attorneys for Petitioners.

[1] Caplin, *The Travel and Entertainment Expense Problem*, 39 Taxes 947 (December, 1961).

APPENDIX A

Section 61, IRC of 1954:

"Sec. 61. (a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

(b) CROSS REFERENCES.—

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following)."

Section 62, IRC of 1954:

"Sec. 62. For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) TRADE AND BUSINESS DEDUCTIONS.—The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

(2) TRADE AND BUSINESS DEDUCTIONS OF EMPLOYEES.—

(A) REIMBURSED EXPENSES.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer.

(B) EXPENSES FOR TRAVEL AWAY FROM HOME.—The deductions allowed by part VI (sec. 161 and following) which consists of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(C) TRANSPORTATION EXPENSES.—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of service as an employee.

(D) OUTSIDE SALESMEN.—The deductions allowed by part VI (sec. 161 and following) which

are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer."

Section 63(a), IRC of 1954:

"Sec. 63. (a) GENERAL RULING.—Except as provided in subsection (b), for purposes of this subtitle the term 'taxable income' means gross income, minus the deductions allowed by this chapter, other than the standard deduction allowed by Part IV (sec. 141 and following)."

Section 161, IRC of 1954:

"Sec. 161. In computing taxable income under Section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in Part IX (sec. 261 and following, relating to items not deductible)."

Section 162(a), IRC of 1954:

"Sec. 162. (a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000."

Reg. §1.162-1(a):

"(a) In general. Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as a basis for a deduction or a credit under provisions of law other than section 162. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. See § 1.61-3(a). Among the items included in business expenses are management expenses, commissions (but see section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see § 1.62-2), advertising and other selling expenses, together with insurance premiums

against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. No such items shall be included in business expenses, however, to the extent that it is used by the taxpayer in computing the cost of property included in its inventory or used in determining the gain or loss basis of its plant, equipment, or other property. Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is nevertheless deductible even though such expenses exceed the gross income derived during the taxable year from such business. In the case of any sports program to which section 114 (relating to sport programs conducted for the American National Red Cross) applies, expenses described in section 114(a)(2) shall be allowable as deductions under section 162(a) only to the extent that such expenses exceed the amount excluded from gross income under section 114(a)."

Reg., § 1.162-2:

"§ 1.162-2. Traveling expenses.—(a) Traveling expenses include travel fares, meals and lodging, and expenses incident to travel such as expenses for sample rooms, telephone and telegraph, public stenographers, etc. Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incidental to travel

are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including travel fares, meals and lodging, and expenses incidental to travel are business expenses. For the allowance of traveling expenses as deductions in determining adjusted gross income, see section 62(2)(B) and the regulations thereunder.

"(b)(1). If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.

"(2). Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five

weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of clear showing to the contrary.

"(c). Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

"(d). Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible.

"(e). Commuters' fares are not considered as business expenses and are not deductible.

"(f). For rules with respect to the reporting and substantiation of traveling and other business expenses of employees for taxable years beginning after December 31, 1957, see §1.162-17."

Reg. § 39.23(a)-2:

"(a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals and lodging, are business expenses.

"(b) If, then, an individual, whose business requires him to travel, receives a salary as full compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income.

"(c) If an individual receives a salary and is also paid his actual traveling expenses, he shall include in gross income the amount so repaid and may deduct such expenses.

"(d) If an individual receives a salary and also an allowance for meals and lodging, as, for example, a per diem allowance in lieu of subsistence, the amount of the allowance should be included in gross income and the cost of such meals and lodging may be deducted therefrom.

"(e) A payment for the use of a sample room at a hotel for the display of goods is a business expense.

"(f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted.

"(g) A taxpayer claiming the benefit of the deductions referred to in this section must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business during the taxable year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

"(h) Claim for the deductions referred to in this section must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

"(i) Commuters' fares are not considered as business expenses and are not deductible."

APPENDIX B

Royal Bank of Canada Monthly Letter, Vol. 39, No. 2, page 1 (February, 1958):

"Conferences of all sizes and sorts are important in business life, in professional life, in politics and in the home. Many a person has been frustrated in carrying out his plans because he did not consult the people concerned, learn their ideas, and win their interest.

"The conference we are about to plan is not a convention of men and women who have come together for good cheer, but a meeting of people to discuss issues of interest to them, to contribute ideas, and to carry away thoughts that will be worth remembering.

"We live in a society of growing complexity, in which no one person can know all about anything. A conference brings together people with diverse notions and varied kinds of information. The exchange of thoughts and the pooling of ideas and the study of solutions—these are the essence of the conference method.

"There are subsidiary benefits, too. A conference will give the people who participate in it a better sense of identity. They will be confirmed in their partnership in a common effort. They will prove to themselves the benefit of convincing and persuading rather than overruling one another.

• • • • •

"Do not lose sight of the splendid opportunity this gathering gives you to tap the creative resources of all these individuals who come to your conference inspired by fellowship in a mutual endeavor and stimulated by the exchange of ideas. Determine at the beginning to so shape your conference as to make the most of it. If people go away from your conference with the feeling of belonging to your organization in a valuable way, that is a bonus value that may be more important to your business than all the other conference benefits.

"This statement is true of all sorts of conferences, from the great trade association conference through those of individual businesses and professional societies, to the family conference. * * *."

* * * * *

"What type of person are you going to invite to your conference? Can you draw up a specification of the sort of person you believe will contribute most?

"What you want is a group of experienced people with keen minds, who are determined to find out all they can about the problem and contribute on the basis of that knowledge to its solution."

Report No. 15, Life Insurance Sales Research Bureau (November, 1924) (Excerpts from same):

"One of the chief things to be accomplished by a convention is to secure unanimous understanding of the principles underlying the company's sales operations and the rules which experience has proved to be essential in carrying out those principles. There is no sales organization anywhere which ha. a complete and unanimous grasp of these matters but a convention can do more to give the men that grasp than anything else. Home Offices are constantly under the necessity of formulating principles and rules, and they are similarly in a constant state of disappointment because they are not understood. The convention is the place above all others where this can be accomplished."

* * * * *

"The extent to which the Home Office arranges for transportation depends largely upon the situation of the convention city. If it is centrally located with many lines of approach, it would be impracticable to arrange for many men to meet on their way to the convention. But if the convention is to be held in an isolated spot, or one at considerable distance from the home of the majority of the members attending, then specific plans may be made for assembling at some nearer location

and proceeding together to the destination. If this latter is at all feasible, it is desirable for several reasons. It gives the men a peculiar feeling of satisfaction to travel on a "special" train or on "special" cars, it encourages a friendlier feeling than is generally present at conventions at which the men arrive as strangers, it makes the men more anxious to get down to the real work of the convention when they arrive at their destination, and, above all, it has a decided educational value in its contacts and ever present business discussions."

• • • • •

"Today an ever increasing number of wives take a real interest in what their husbands do, and this interest is frequently referred to by men as being of very great value to them. In fact, it has been said that a wife can not usually be so wholly lacking in contact with her husband's work as to have no influence at all upon it.

"In many cases, this influence is negative rather than positive, and this is particularly true in the careers of many life insurance agents because their work frequently involves evening appointments—a condition usually resented by a wife. Many a wife has thoroughly discouraged her husband because the only thing which she ever knew about his work was that he had to go out at night or that he had failed to 'write that ten' which would give her a new dress. She knew nothing about the bigger things which life insurance accomplishes and of which her husband was or could be a part. The recognition of the very great desirability of 'selling' the wife on her husband's job has spread rapidly in recent years, and today many husbands are helped over the rough spots of their career by the enthusiasm and vision of their wives, much of which can be aroused or increased at a convention."

• • • • •

"Whether a convention is intended to provide instruction or to arouse company loyalty through inspirational talks, there is one thing which should run through all

its preliminary plans and all its sessions, the spirit of cordiality and hospitality. As one company expressed it —'We always try to do just a little bit more for our men than they expect."

"The public expects much of the life insurance business in the way of intelligent, prompt service, and this service is made up of that which is contributed by the Home Office as well as by the agent. The Home Office continually strives to improve both of these factors, and one of its best opportunities to show to its field force the kind of service which it is capable of rendering is at its convention.

"We have endeavored to describe in the preceding pages those items which appear to contribute to the smooth running of a meeting, but over and beyond such matters are the almost countless things which can be done for the pleasure of the visitors. From the moment when they first hear of the proposed meeting until they have returned to their desks, the company has innumerable, small opportunities to impress them with the fact that their company is far from a 'soulless corporation'. It is these human relations which steady and even inspire many a man in days of doubt and discouragement, in those days when he thinks that perhaps he is in the wrong business or in the wrong company."

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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 396

C. J. D. RUDOLPH and IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMERICAN HOTEL ASSOCIATION *AMICUS CURIAE*

LORD, DAY & LORD
25 Broadway
New York 4, New York
Attorneys for American Hotel Association Amicus Curiae

CHARLES W. MERRITT
Counsel.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMERICAN HOTEL ASSOCIATION *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

This brief is submitted on behalf of the American Hotel Association *amicus curiae* with the written consent of both the petitioners and the respondent.

The American Hotel Association is a membership trade association with offices at 221 West 57th Street, New York City and Wyatt Building, Washington, D. C. Its members are state hotel associations, most of which are located in the United States (every state being represented) as well as a comparatively few members in Canada, Mexico, Puerto Rico and other islands of

the West Indies. These state and territorial hotel associations presently have a membership of 5,553 hotels with a total of 647,221 rooms. The hotels range from very small establishments located in villages to large commercial hotels in cities. The membership also includes residential hotels and resort hotels.

The issues in the present proceeding are of direct and immediate interest to every hotel in the United States and its territories. The contentions of the petitioners are (a) that the amount expended by the principal of C. J. D. Rudolph, one of the taxpayers, to send such taxpayers to a company convention held at a New York City hotel was not income to the taxpayer and (b) that if said amount constituted income to the taxpayers, they are also entitled to treat the expenditure of said amount as an ordinary and necessary business expense for income tax purposes.

The hotel business is essentially one which furnishes service to individuals while they are away from home. The taxpayer Rudolph and his wife are typical of the individuals who patronize hotels while attending business meetings and conventions. The decision of the Court below in this proceeding against the taxpayers has had an immediate adverse effect upon this segment of this large and important industry. It is also of great importance to those related industries whose business benefits from the patronage of the business traveler and convention delegate, such as the retail stores, restaurants and the transportation industry.

The 1958 Census of Business, taken by the Bureau of Census of the United States Department of Commerce, lists 11,141 year-round hotels in the United

States as having 25 or more guest rooms. These hotels reported total annual receipts from customers of $2,363,083,000. These same establishments reported having 361,596 employees and annual payrolls of $851,807,000. 8,882 of these establishments, having a total of 947,281 guest rooms, gave a breakdown of annual receipts from customers which includes the following figures:

Guest room rentals	$1,130,052,000.
Meals and nonalcoholic beverages	$ 600,007,000.
Alcoholic beverages	$ 230,751,000.

3,974 seasonal hotels are also listed in the census having receipts of $241,034,000 and 22,818 employees. 3,126 of these establishments, having 164,910 rooms, reported annual payrolls of $64,639,000.

Every hotel, large or small, and year-round or seasonal, currently derives an increasing percentage of its business from business meetings and conventions. The increased speed and facility of travel in recent years and the complexity of modern business organizations have resulted in a tremendous growth in the number, importance and size of business meetings and conventions held in hotels in all parts of the country. There are valid business reasons for holding these meetings away from the home office of a company. In addition, the growth of trade associations, professional groups, labor unions and similar organizations has made the convention an integral and important part of American economic and cultural life. This changing pattern of business practice has, in turn, changed the pattern of the hotel patronage. The

hotel's economy is now based, to a substantial extent, upon the increasing use of hotel facilities for business meeting and convention purposes. The decision of the court below in the present proceeding raises a direct threat to this economy and the final decision can have immediate and widespread effects on the entire industry.

ARGUMENT

1. The Amount Paid for Transportation and Subsistence Did Not Constitute Gross Income to the Taxpayers.

In the present proceeding the taxpayers are being assessed Federal income tax on the estimated fair value of transportation and subsistence furnished to them by Southland Insurance Company. The taxpayer C. J. D. Rudolph is a life insurance agent for said Company and he and his wife attended a convention of agents held in New York City and paid for by the Company.

We urge that under the circumstances of this case the estimated value of the transportation and subsistence did not constitute gross income to the taxpayers. In the early case of *Eisner* v. *Macomber*, 252 U. S. 189, 207 (1920), it was made clear that to constitute income the taxpayer must have received "something of exchangeable value * * * for his separate use, benefit and disposal." Other statements of this general principle are found in numerous subsequent cases.

> "The Court is aware of no all-inclusive test of compensation as the term is used in the statute. It would seem that it must contemplate an economic benefit to the employee. Here, it can hardly be disputed that the furnishing of food and lodging to the taxpayer was not to his economic benefit.

Every benefit, however received by a taxpayer from his labor, is not taxable." [*Diamond* v. *Starr*, 116 F. Supp. 28, 31 (1953)].

"* * * The power to dispose of income is the equivalent of ownership of it and the exercise of the power to procure its payment to another is within the reach of the statute taxing income '"derived from any source whatever."' Harrison v. Schaffner, 312 U. S. 579, 580, 61 S. Ct. 759, 760, 85 L. Ed. 1055. To the same effect are Lucas v. Earl, 281 U. S. 111, 114, 50 S. Ct. 241, 74 L. Ed. 731; Galt v. Commissioner of Internal Revenue, 7 Cir., 216 F. 2d 41, 46 and 47, and Pleason v. Commissioner of Internal Revenue, 7 Cir., 226 F. 2d 732." [*Hulbert* v. *Commissioner*, 227 F. 2d 399, 401 (1955)].

"Petitioner received 'nothing of exchangeable value'; he received a credit upon the cost of a capital investment; he merely entered into a transaction whereby he procured decrease in his capital loss." [*Hirsch* v. *Commissioner*, 115 F. 2d 656, at page 658 (1940)].

Applying these principles to the facts surrounding the payment in the present proceeding makes it clear that the essential elements of control, choice and disposition by the taxpayers were completely absent. The facts appear to be undisputed. The taxpayer C. J. D. Rudolph was required to write $400,000 insurance during the year to be eligible to be invited on the trip; all arrangements were made by the Company; the taxpayers were required to go on the special train;

they were not consulted as to the arrangements or accommodations; the time for the trip and the complete program were set by the employer; the Company considered the entire trip part of its training program and agents who were invited were required to follow such program; the wife was expected to attend; and finally the taxpayers had no knowledge of the amount expended by the Company for transportation and subsistence. It would be difficult to find a more comprehensive set of facts to demonstrate the complete lack of control, a factor which must be present if the payment is to constitute income. In the language of the *Eisner* case, *supra*, it was certainly not of "exchangeable value" nor was it for the taxpayers' disposal. It is hard to find the "economic benefit to the employee" referred to in *Diamond* v. *Sturr*, *supra*, unless a training program can be held to constitute an indirect economic benefit to an employee or agent. The cases do not go that far.

It is well to keep in mind the admonition in *Bittendorf* v. *Commissioner*, 49 F. 2d 173, 176 (1931):

> "* * * The government will not resort to sharp practice, nor invoke technical construction or fiction, which will manifestly thwart the good-faith intention of its taxpayers, for the purpose of visiting a tax burden upon one who in fact did not, except by construction, derive any beneficial income from the transaction."

2. If the Value of the Transportation and Subsistence Provided to the Taxpayers Constitutes Gross Income, the Taxpayers are Entitled to Deduct the same Amount from Gross Income as a Travel Expense While Away from Home in the Pursuit of a Trade or Business under Section 162(a)(2) of the Internal Revenue Code.

Section 162 of the Internal Revenue Code provides, in part, as follows:

> "SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;"

It is urged that in the present proceeding the expense was not only ordinary and necessary but was incurred in the carrying on of a trade or business. It has long been settled that to be deductible the expense must be both ordinary and necessary. *Helvering* v. *Highland*, 124 F. 2d 556, 562 (1942); *Commissioner* v. *The Hub*, 68 F. 2d 349 (1934); *Deputy* v. *Du Pont*, 308 U.S. 488 (1940). In some cases it has been held that an expense may be ordinary though it happened but once in a lifetime if the transaction were of common or frequent occurrence in the type of business. *Welch* v. *Helvering*, 290 U.S. 111 (1933). That question does not arise in the present proceeding because the taxpayers had, for many years, been attending similar conventions paid for by the Company.

As pointed out above, the business meeting or convention has become an established feature of American business life and the expense of attending one has long been recognized as ordinary. Reg. Sec. 1.162-2(d).

In *Commissioner* v. *Flowers*, 326 U.S. 465 (1946), the rule is set forth most fully as follows, at page 470:

> "Three conditions must thus be satisfied before a traveling expense deduction may be made under § 23(a)(1)(A)*:
>
> (1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred 'while away from home.'
>
> (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

In the same case, at page 474, the rule is further clarified:

> "Travel expenses in pursuit of business within the meaning of § 23(a)(1)(A) could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad. Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such is not the case here."

---

* Now Sec. 162 of 1954 Int. Rev. Code.

See also *Ney* v. *U.S.*, 171 F. 2d 449 (1948) and *Berean* v. *Commissioner*, 165 F. 2d 521 (1948).

Applying these principles to the facts in the present proceeding, there can be no question as to the "direct connection between the expenditure and the carrying on of the trade or business of the taxpayer." It was a trip sponsored and paid for by the Company and, as pointed out above, undertaken by the taxpayer solely because of the "exigencies of business." The circumstances surrounding the trip and the absolute control over it exercised by the Company negative any finding that the motivating factor was the "personal convenience" of the taxpayers.

Regs. 1.162-2(b)(1) makes traveling expenses to and from a destination deductible "if the trip is related primarily to the taxpayer's trade or business." The circumstances surrounding the trip involved in this proceeding of the taxpayers' attendance at the convention make it clear that the trip did relate primarily (if not entirely) to the taxpayers' trade or business. The same regulation disallows such traveling expense if the trip is primarily personal in nature but permits an allocation of expense incurred at the destination. No such allocation of expense was permitted in the present case which implies that the entire trip was "primarily personal in nature," a conclusion which is completely contrary to any reasonable interpretation of the facts.

It is unnecessary to cite the numerous cases holding that expenses of attending a convention may constitute ordinary and necessary business expense deductible under Section 162. Regulation 1.162-2(d) specifically recognizes the deductibility of such expenses under cer-

tain circumstances. The regulation permits such deduction under proper circumstances even if attendance at the convention is voluntary, although in the present proceeding it is very clear that attendance was by no means voluntary. In the language of the regulation,

> "The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance."

In the present proceeding the facts clearly demonstrate the relationship between the taxpayer's insurance agency business and the convention arranged and paid for by the Company and which for business reasons he was compelled to attend. It is also clear that he was "benefiting or advancing the interests of his trade or business by such attendance." His testimony as to the train trip in the exclusive company of other agents, both going to and coming from the convention, and his attendance at the business session makes it clear that he at least believed that he was benefiting or advancing the interests of his business by such attendance.

Disallowance of the entire expense in the present proceeding is in effect a finding that unless every waking hour of the participants traveling to and during a business convention is spent in the discussion of business matters, the purpose of the meeting and the trip thereto will be held to be personal and the entire expense disallowed.

The American Hotel Association does not believe that this is the law and that the fair and reasonable

interpretation of the tax laws intended by Congress does not justify such a result.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit entered June 17, 1961 should be reversed and the case remanded to the District Court for the entry of judgment in favor of the petitioners for the relief demanded in their first amended original complaint.

Respectfully submitted,

LORD, DAY & LORD
25 Broadway
New York 4, New York
Attorneys for American Hotel Association Amicus Curiae

CHARLES W. MERRITT
Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 78–81) is reported at 189 F. Supp. 2. The opinion of the court of appeals (R. 96–102) is reported at 291 F. 2d 841.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1961 (R. 103), and the petition for rehearing was denied on July 28, 1961 (R. 105). The petition for a writ of certiorari was filed on September 11, 1961, and was granted on November 13, 1961, 368 U.S. 913 (R. 106). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

An insurance company provided an all-expense paid trip from Dallas, Texas, to New York City for those of its insurance agents (including petitioner) who had sold prescribed amounts of insurance during the year, together with their wives. The district court found that the company's primary reason for providing the trip, though in the form of a "convention," was to confer an additional benefit upon the agents who met the sales quota. It further found that the primary reason petitioner and his wife took the trip was for personal pleasure. The questions presented, of which only the first appears to be in dispute, are:

1. Were the findings of the district court concerning the reasons for the trip, affirmed by the court of appeals, clearly erroneous?

2. If, as the district court found, the trip was given to petitioner by the company primarily for the purpose of conferring a benefit upon him, is the fair market value of the trip "income" to petitioner within the meaning of § 61(a) of the Internal Revenue Code of 1954?

3. If, as the district court found, petitioner took the trip primarily for purposes of personal pleasure, and the value of the trip is included in his income, is he entitled to an offsetting deduction for the (attributed) cost of the trip as an "ordinary and necessary" business expense under § 162(a) of the Code?

STATUTES AND REGULATIONS INVOLVED

Sections 61, 161, 162, and 262 of the Internal Revenue Code of 1954 and Treasury Regulations on Income Tax (1954 Code), Sections 1.61–1, 1.61–2, 1.162–1, 1.162–2, and 1.262–1 are printed in part in the Appendix, *infra*, pp. 61–66.

STATEMENT OF FACTS

The petitioner[1] is an insurance agent selling for Southland Life Insurance Company. During 1956, he was a resident of Dallas, Texas, where the home office of the Company was located.

In 1956, petitioner qualified to attend the Company's convention in New York City with his wife by selling the amount of insurance set by the Company. The sales requirements for qualification were announced by the Company in advance (R. 91–95), and the names of the salesmen qualifying were reported in a monthly magazine sent to all agents (R. 41). Of the approximately one-third of the Company's agents in its Ordinary Division who met the qualification standard (R. 60), all but 10 or 12 attended (R. 59–60). No award was made in lieu of the convention trip to those who did not attend (R. 32, 46). Petitioner attended the convention with his wife.

The agents and officers attending the convention (totaling, with their wives, 293 persons) traveled to and from New York City on special trains and were provided with rooms at the Waldorf-Astoria Hotel

[1] C. J. D. Rudolph will, for convenience, be referred to as the sole petitioner. His wife is a party only because a joint return was filed.

(R. 25, 28, 87). The group left Dallas at 9:30 P.M. Tuesday, December 11, 1956, and returned to Dallas on Tuesday, December 18. They were in New York City from late afternoon on Thursday, December 13, until Sunday morning, December 16 (R. 83–86). The schedule in New York City provided for a business session at 9:30 A.M. Friday, December 14, followed by a luncheon at which an address was given by Dr. Norman Vincent Peale on "Success Through Right Thinking." The rest of the convention schedule consisted of sight-seeing tours of New York City, a breakfast and fashion show for the wives, the special Christmas show at Radio City Music Hall, and an evening at the Copacabana night club. The Company provided coupons for tours of the Empire State Building, Rockefeller Center, and National Broadcasting Company and offered a limited number of tickets for live radio and television shows (R. 83–86). The rest of the program was free time which petitioner and his wife devoted to their own enjoyment (R. 37–39, 79, 83–86).

The value of the all-expense paid trip from Dallas to New York City, taken by petitioner and his wife and paid for by the Company, was $560. Petitioner and his wife failed to report this amount on their joint income tax return for 1956, and the Commissioner assessed a deficiency in income tax in the amount of $126.90, which then was paid with interest (R. 78).

In the subsequent suit for refund, the district court held that the trip had been earned by the taxpayer, was in the nature of a bonus, reward, and compensation for a job well done, and that, as compensation,

the $560 value of the trip properly was included in the income of the petitioner and his wife. The district court further found that, for petitioner and his wife, the trip was primarily a pleasure trip in the nature of a vacation, and hence its cost, once attributed to them as income, was a personal expense for which they were not entitled to an offsetting deduction (R. 80–81). The findings are quoted at length at pp. 12–13 of the Argument, *infra*.

The court of appeals (Judge Brown dissenting) affirmed, *per curiam*, upon the facts set forth in the opinion of the district court and upon the basis of the legal principles set forth in its opinion in *Patterson* v. *Thomas*, 289 F. 2d 108, certiorari denied, 368 U.S. 837, motion for leave to file petition for rehearing filed December 5, 1961 (No. 109, this Term) (R. 96–102).

SUMMARY OF ARGUMENT

1. The district court expressly found as a fact that the primary reason why the Company paid for the trip to New York for petitioner and his wife was to confer a benefit upon him because of his past services (specifically, selling the prescribed amount of insurance). It also found that the primary reason petitioner took the trip was for his (and his wife's) personal pleasure. It was on precisely that kind of question of fact—the reasons motivating human conduct—that this Court in *Commissioner* v. *Duberstein* emphasized the "primary weight" to be given to the trial court's findings and the necessarily "quite restricted" scope of appellate review. Additionally,

since those findings were affirmed by the court of appeals, they are clothed here with the additional weight this Court has given to the concurrent findings of two lower courts. Finally, the district court's ultimate findings of motivation are in any event a more than permissible inference from the facts, *inter alia*, that the agents invited on the trip were those who had sold prescribed amounts of insurance; that the nature of the trip, its desirability, and the sales quota that had to be met to be eligible for it were all announced in advance; that the so-called "convention", like those of prior years held in such places as Havana and Mexico City, was held at a place far removed from the Company's home territory and noted for its tourist attractions; and that but one morning of the two-and-a-half day stay in New York was devoted to a "business" meeting, with the balance of the time being occupied by entertainment and social events. Those findings, not "clearly erroneous," are binding here.

2. If petitioner would have been entitled to deduct the cost of the trip had he paid for it himself, the question whether the value of the trip, paid for by his employer, was "income" to him would not be reached, since he would be entitled to an offsetting deduction in any event. On the district court's finding that petitioner took the trip primarily for reasons of personal "pleasure", however, he plainly could not have deducted the cost as an "ordinary and necessary" business expense. Petitioner does not disagree, but, to the contrary, expressly acknowledges that the "ultimate issue" on the deduction question is his

"dominant motive and purpose" for going—did he go "primarily for reasons of business or personal pleasure?" (Br. 36).

Challenging the district court's findings, however, petitioner asserts that the Company "expected" the agents invited to attend and that he was therefore induced to go by fear of otherwise jeopardizing his position. In addition to the rejection of petitioner's factual premise by the district court, his legal premise—that whatever the employer demands as a condition of continued employment is *per se* an "ordinary and necessary" business expense—is too broad to be sustainable. In the world of the "organization man" to which the dissenting opinion below refers, there are many things one may "have" to do to keep his job that are nevertheless not deductible: dress well, live in the proper neighborhood, entertain graciously, etc. That an employer would look with displeasure upon an employee who declined an offer to participate in the corporate "family" fun does not, of itself, convert the cost of an otherwise "pleasure" trip into an "ordinary and necessary" business expense. The expense may be "necessary" in a but-for sense, but it does not bear to the business the *kind* of relationship that the term "ordinary" additionally requires.

Petitioner further asserts that, while the formal business session occupied but a small part of the time in New York, the informal talk with the other agents and officers during the train trip and the social gatherings was also of educational value and was a further "business" reason for his going on the trip. Again, however, the district court found that not to have been

petitioner's reason for going, so that the claim falls even if we assume (which, however, we deny) that informal "shop talk"—as much a part of the life as of the business of the professional man—is to be deemed an "ordinary and necessary" business activity to which tax significance should be attached.

3. Since the cost of the trip would not have been deductible by petitioner if paid for by him, the Company's provision of the trip specifically for the purpose, as the district court found, of conferring a reward upon the agents who sold the required amount of insurance constituted "income" to petitioner in the nature of "compensation." Petitioner initially suggests, though he soon abandons the contention, that since the value of the trip could be realized only by the taking of it, and hence had no "transferable" value, its receipt in kind is not within the definition of "income." The contention that what must be consumed is not in its "nature" income is refuted not only by this Court's rejection in *Glenshaw Glass* of such a conceptualistic approach to gross income problems, but by petitioner's own acknowledgment that the value of meals and lodging furnished by an employer for the benefit of an employee—which are equally realizable only by consumption—are taxable as income. A vacation trip furnished by an employer for the benefit of his employees is no less income.

Petitioner ultimately abandons the argument that his receipt was not in its nature income by adding the limitation, "if not intended as compensation," which he also acknowledges refers to the employer's reasons for providing the trip. Thus his argument, initially

clothed as one of definition, reveals itself again as simply an attack upon the district court's findings. Since the district court found that the very reason the Company provided the trip in this case was to confer a benefit upon petitioner because of his past services—*i.e.*, what is meant by an "intent to compensate"—that finding establishes that the value of the trip was income to petitioner even under his own statement of the controlling question.

The petition for certiorari in this case was presumably granted because it purported to present questions turning on the definition of "income" and of "ordinary and necessary" business expenses. Should the Court agree with us, however, that all of petitioner's arguments ultimately reduce themselves to simply an attack upon the district court's findings, it will have no occasion to consider or decide the questions of definition latent in petitioner's view of the facts. Rather, the judgment below may properly be affirmed on the ground simply that the findings of the district court of the reasons for the trip—concededly the ultimate and controlling facts—are not clearly erroneous (or, under the two-court rule, are not open here).

ARGUMENT

The Southland Life Insurance Company sponsored and paid for a trip from Dallas, Texas, to New York City for 151 of its agents, officers and employees, plus their wives. Of the two and a half days spent in New York, one morning was devoted to a business session

and the balance of the time was devoted to various forms of entertainment. The agents selected for the trip—about one third of the total number of agents for the Company—were those who met previously-announced sales quotas. Petitioner, having sold the required amount of insurance during the preceding year, participated in the trip with his wife.

The ultimate question presented is whether petitioner was taxable on the value of the expense-paid trip for himself and his wife. That question turns upon two subordinate questions: (1) whether the value of the trip was includible in petitioner's "gross income" under § 61(a) of the Code; and (2), if so, whether petitioner was entitled to an offsetting business-expense deduction under § 162(a) (*i.e.*, viewing the case as though the Company had paid petitioner an equivalent amount in cash and he had paid for the trip himself).

On neither question do we believe there is any substantial dispute between the parties as to the governing legal standards. Petitioner's real quarrel is with the findings of the district court and the main thrust of his argument here, although not styled as such, is that those findings should be set aside as "clearly erroneous." Both because the factual question seems to be the main point in issue and because the facts relevant to both legal questions are substantially the same, we shall consider first the district court's findings and show not only that they are not clearly erroneous, but that any other findings would have been wrong. We will then show—though we do not think

petitioner really disputes it—that if those findings are accepted it necessarily follows that the value of the trip was neither excludible nor deductible by petitioner. Finally, we will show briefly the additional reasons why the value of his wife's trip is taxable even if the value of petitioner's own trip is not.

I

THE DISTRICT COURT'S FINDINGS THAT THE DOMINANT REASON WHY THE COMPANY PROVIDED THE TRIP WAS TO CONFER A BENEFIT UPON PETITIONER AND THAT PETITIONER TOOK THE TRIP PRIMARILY FOR PLEASURE RATHER THAN FOR BUSINESS REASONS ARE NOT CLEARLY ERRONEOUS

Both parties are agreed that the relevant ultimate facts upon which the legal questions in this case turn are (a) the reasons why the Company sponsored and paid for the trip and (b) the reasons why petitioner and his wife took the trip offered by the Company. The question of fact, that is, is one of causation or motivation and is of the same character, as petitioner also acknowledges (Br. 25), as the question of ultimate fact held controlling for purposes of the "gift" exclusion in *Commissioner* v. *Duberstein*, 363 U.S. 278, 286:

> * * * the proper criterion * * * is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. * * *[2]

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[2] The "why" rather than the "what," and thus perhaps more properly described as "motive" rather than "intent." As the Court noted in *Duberstein*, however, it matters little what label is used so long as the nature of the inquiry is clear.

It is, accordingly, for the motivating reasons for the Company's and the petitioner's actions that the district court's findings and the evidence are to be examined.

1. There is no question in this case of what the district court found; the findings, incorporated into the court's opinion, are clear and present no questions of interpretation. The relevant excerpts from the opinion are (R. 80–81):

> * * * But what business reason is there for holding a convention in a place as far away as New York; and certainly, what business reason is there for holding a convention in Havana, Cuba [a prior year's convention site]. It was not held down there for educational purposes in insurance.
>
> Assume that it was to a degree; what was the primary purpose of the trip? It was a reward, or a bonus given to the employee for excellence in service. * * *
>
> All of the evidence considered, we think it irrefutably leads to this conclusion: That the insurance company was just doing a gracious, magnanimous thing of awarding those leading agents a trip just as much as if it had awarded them an automobile * * *.
>
> The Court's conclusion is that the holding of these conventions generally, and especially the holding of them at remote places, have the primary purpose of affording a pleasure trip which the agent himself, to enjoy, would have paid out of his own funds if the company had not given it to him, which is in every way in the nature of a reward that would be a bonus.

> * * * the primary purpose of it [a trip given employees in a hypothetical example offered as an analogy] was to hold out an alluring reward to make them work harder. * * *
>
> Therefore, we conclude, that the trip was earned by [petitioner] and was in the nature of a bonus, reward, and compensation for a job well done. * * *
>
> Further, since the trip was primarily a pleasure trip in the nature of a vacation, its cost is personal to the husband and wife and therefore not deductible by them.

The findings as to the Company's reasons, in short, were that the "primary" (if, indeed, not the only) reason for the Company's providing the trip was to confer a benefit upon the employees meeting the production quotas and to provide an inducement for them to "work harder" in order to qualify for the benefit. To petitioner, in turn, the trip was "primarily a pleasure trip in the nature of a vacation," to enjoy which he would have paid himself if the Company had not given it to him. The primary reason for taking the trip was the pleasure and enjoyment of himself and his wife.

2. It is upon the validity of those findings, as we will show, that this case turns. While petitioner does not formulate his argument as an attack upon the findings as such, at every crucial point of the argument his premise, expressed or implied, is that the Company provided the trip, or the petitioner took it, for reasons other than those found by the district court. If the findings stand, petitioner's argument must fall, and the case thus reduces itself to the

question whether those findings are "clearly erroneous."

Just as in *Commissioner* v. *Duberstein*, *supra*, the question of ultimate fact in this case—the final factual inference remaining to be drawn even from undisputed basic facts—is one of the motivation of human actors, the "reasons" that "explain" their conduct. Thus the broad deference which the Court there emphasized should be given to the trial court's findings on such a basic aspect of human behavior is fully applicable here. In making an inference on a matter so elusive and subjective as motivation, the Court stressed, the trier of fact cannot be restricted to any single factor but is to consider "all the factors" and, to the "multiplicity of relevant factual elements," bring to bear his own "informed experience with human affairs" and with "the mainsprings of human conduct" (363 U.S. at 288, 289, 292). From the nature of the inquiry, and the variety of elements relevant to its resolution, it follows as a corollary that, on such questions, "primary weight" is to be given to the trial court's findings and appellate review "must be quite restricted" (363 U.S. at 290–291). It is with that gloss upon the "clearly erroneous" standard, as applied to a question of motivation of the sort involved here,[3] that a consideration of the evi-

[3] We may note our disagreement with those who have read the quoted parts of the *Duberstein* opinion as referring, not simply to the question of motivation, but to the ultimate question, without separation of law and fact, whether a transfer is a "gift" within the meaning of § 102 of the Code. See Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 Harv. L. Rev. 81, 88–91; Lowndes, *Federal Taxation and the Supreme Court*, 1960 Sup. Ct. Rev. 222, 234. The

dence supporting the findings here must be approached.

Court was there speaking only of the scope of review of the findings of fact, including "factual inferences." What the ultimate factual inference was, in turn, the Court had already taken care to spell out. The "proper criterion," the Court had said, "is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer" (363 U.S. at 286). Once the reason for the transfer was found, there remained the further question—necessarily one of law, for otherwise the statutory term "gift" could not have been defined—whether the reason found was one making the transfer a gift or not a gift. The Court itself made that very distinction, not only in *Duberstein* but also in the companion case, *United States* v. *Kaiser*, 363 U.S. 299. Thus in *Duberstein* the Court stated as a matter of law the reasons which, if found, make the transfer a gift (*e.g.*, "affection, respect, admiration, charity or like impulses") and those which, if found, make it not a gift (*e.g.*, "anticipated benefit" to the transferor) (363 U.S. at 285). In *Kaiser*, in turn, the Court affirmed a jury finding of a gift only after concluding that the jury could properly have found that the payments were made for a reason which *the Court* considered to be a gift reason ("generosity or charity") (363 U.S. at 304). And it hardly needs adding that, while a trier of fact's familiarity with the "mainsprings of human conduct" will no doubt tell him a good deal about the motivation of a board of directors or, as here, of an insurance agent, it is hardly likely to tell him anything about the meaning of the term "gift" in the Internal Revenue Code. Thus the commentators' attribution to the Court of a purpose to include the question of definition itself within the fact-finder's function seems to us quite unwarranted. Accordingly, we rely upon the re-emphasis in *Duberstein* of the limited scope of review of findings of ultimate fact only as to the similar question of ultimate fact in this case—the Company's reasons for providing the trip and petitioner's reasons for taking it. We do not rely upon a limited scope of review of the further question whether a trip given for those reasons constitutes "gross income" or whether the reasons for which it is taken constitute "business" reasons qualifying the cost for deduction.

One implication of *Duberstein* that is particularly pertinent here is that the trier of fact, in making a judgment on the subtle and elusive forces motivating conduct, is not bound to accept, as petitioner seems to assume in his brief, all oral testimony offered by a taxpayer that is not specifically contradicted by oral testimony for the government. He may, for example, properly conclude that one or two contemporaneous expressions of purpose are entitled to greater weight than the testimony of a multitude of witnesses, all interested in the outcome, attempting to recreate, with a new awareness of its significance, an articulation of aims and motives that tend inevitably to gain or lose much in the telling.[4] Or, again, he is entitled to have

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[4] For example, Kenneth B. Skinner, company vice-president and agency director, testified at the trial of the present case that the trip was not intended as an award or prize and further stated (R. 46):

> The purpose of the convention was to have the opportunity or method of communications to our sales force as to the company's objectives and plans, and the exchange of ideas in the methods of successfully selling life insurance.

However, in his letter of welcome, printed in the convention brochure, Mr. Skinner stated to the qualifying agents (Tr. 39 (unprinted)):

> Every phase of this New York Convention trip was planned with your pleasure in mind. Our aim is to express in some measure our appreciation of you and the work you are doing. Our only request is that you ENJOY YOURSELF.

In another letter of greeting in the brochure, Dan C. Williams, president, similarly stated (Tr. 38 (unprinted)):

> May you find this 1956 Agency Convention rewarding—well worth the considerable investment of yourself which the earning of it demanded.

a healthy scepticism of the "business" reasons for holding "conventions" for Texas-based insurance agents in Havana or New York City. As the Court said in *Duberstein*, that is just "the sort of informed experience with human affairs that fact-finding tribunals should bring to this task", and conclusions so based are not to be set aside as "mere suspicion[s]" (363 U.S. at 292).

Turning to the affirmative evidence supporting the findings, it is, we submit, more than ample to justify—if not require—the court's conclusion that the Company sponsored the trip, not for instructional or other independent business reasons, but solely, or at least primarily, in order to confer a benefit upon qualifying agents, and that the petitioner in turn accepted the trip primarily because of the enjoyment and pleasure it offered. The convention—like those of other years held by the Company in Canada, Mexico City, Havana, Colorado and California (R. 34, 49)—was held at a prime tourist area far removed from the Company's usual area of business.[5] An expense-paid trip to such a location, with a minimum of nominal business activities and a maximum of free time to enjoy the attractions offered in the area in and of itself strongly suggests that both the giver and the receiver have the pleasure of the receiver as their

[5] With but a single morning session and lunch being devoted to business, it is difficult to take seriously the suggestion that it was necessary to hold conventions outside the Company's home territory because otherwise agents might devote time to their own business rather than attend to convention business (R. 44, 62).

primary object.[6] That the agents' wives were included in the annual "conventions," held at far-away places equally attractive to them, adds strong support to the inference.

The selection of the agents offered the trip was based upon their selling prescribed amounts of insurance or producing stated amounts of premiums, the requirements being announced in advance to permit increased sales activity to meet them (R. 42, 49, 91–95). With the terms of the competition having been set, the advantages of qualifying under them were repeatedly emphasized, with appropriate publicity being given to those who had satisfied the sales requirements (R. 41). Wives were made aware of the trip possibilities for themselves, so they could encourage their husbands to make the necessary effort to qualify (R. 41). That holding out of the trip as a

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[6] Petitioner is in error in suggesting that the government does not question the bona fides of the convention (Br. 7), citing page 67 of the Record. The reference is apparently to the statement by government counsel that:

> One further reason for my objection is, as I stated before, we are not challenging the bona fides of this production [deduction?] to the insurance company; that is not an issue and any evidence on that matter is irrelevant to our issue.

The word "production" seems an obvious mistranscription of "deduction," and it is true that we have never challenged the deductibility of the cost of the convention to the Company. That is so, however, only because it is deductible by the employer *either* as compensation paid *or* as an independent business expense. We do challenge the "bona fides" of the convention to the extent that the "convention" label implies that the primary purpose of the occasion was anything other than to provide a pleasure trip for the employees.

reward to be earned was, we submit, clearly inconsistent with the explanation offered by petitioner (Br. 24) that the sales-volume method of selection was designed simply to single out the more successful agents who would most benefit from the convention. For that purpose, the prior announcement of the sales requirement as a goal towards which to strive would have been unnecessary. Additionally, the sale-volume test was utilized only for the Company's annual convention at resort cities; for the smaller educational meetings and schools reguarly held by the Company at its home office or in the field, attendance was determined rather on the basis of individual aptitude or need for the particular instruction (R. 58–59). There was, therefore, more than sufficient evidence to warrant the court's conclusion that the trip was, in fact, offered by the Company as a reward or prize in order to provide an inducement for increased sales efforts by the agents.

Petitioner, in turn, testified that he regarded the Company's program leading to the trip at least partially as an incentive in making sales (R. 41–42). He further testified that he read the "1956 Convention Qualification Rules" with interest and that he and his wife looked forward to and planned for the convention trip (R. 36). Clearly he regarded the trip as something desirable to be earned, rather than as a chore to be endured.

There remain, finally, the inferences to be drawn from the relative amounts of time spent during the trip on business and on entertainment activities. Of the two and a half days in New York, one morning

session (Friday, December 14), followed by a lunch, was devoted to a "business meeting" consisting of talks by Company officials, an agents' panel discussion, and an address, at the luncheon, by Dr. Norman Vincent Peale. The rest of the time in New York was given over to either Company-arranged entertainment or free time. The Company-planned events included a sight-seeing trip en route to the Waldorf-Astoria on the afternoon of arrival (Thursday, December 13); another sight-seeing tour of Manhattan the following afternoon; a breakfast and fashion show for the wives on Saturday, followed by the special Christmas show at Radio City Music Hall in the afternoon and an evening at the Copacabana night club for "dinner, dancing and floor show." For the free time, the Company provided tickets for radio and television shows and for various additional tours (R. 83–86).

Simply from the objective facts of the nature of the trip and the minimal amount of time devoted to the formal "business" session, the trial court was entitled to draw the inference that the Company did not spend $80,000 (R. 59) to transport 151 agents and officers, together with their 142 wives, from Texas to New York in order that they might spend three hours listening to talks given by Company officials also brought from Texas. Some more substantial reason must have been present, and that reason, the court properly inferred, was the purpose to confer, by the trip, additional benefits upon the agents who had exceeded the stated sales quotas.

It may be, as petitioner suggests, that there were some indirect benefits to the Company deriving from

informal exchanges among its agents and officers during the course of the train trip and the social or entertainment activities. Whether or not in theory such incidental benefits resulting from social functions provided for one's employees could qualify as a non-compensatory purpose, the record here would support only the barest inference that any significant amount of such exchanges in fact took place, even during the train trip upon which petitioner heavily relies (R. 29–30). And plainly, there is nothing in the record that requires the district court to believe, as he chose not to believe, that the anticipation of such benefits was a primary, or even significant, factor in the Company's decision to provide the trip.

Petitioner apparently suggests, finally, that it was clearly erroneous for the court to find that he took the trip for "pleasure" rather than from fear that failing to go would jeopardize his position or opportunities for advancement. Even assuming the relevance of "compulsion" in that sense, the record fully supports the conclusion that no such "compulsion" existed in any meaningful sense or that it was not in any event an operative factor in petitioner's decision to take the trip. While petitioner stated that he was "expected" to go, he declined to say that his non-attendance would have been "frowned upon" or cause him to be "dismissed" (R. 28). Nor does it appear that the ten or fifteen agents who, for one reason or another, chose not to attend suffered any recriminations (R. 59–60). The reason why petitioner took the trip was, rather, that eloquently expressed by him

when he testified that he would take it again "tomorrow" if offered the opportunity on an expense-paid basis (R. 43).[7]

In summary, on this record the only plausible explanation of the transaction is that the Company offered the trip as a reward or prize to stimulate increased sales activities by its agents and that the petitioner, having earned the right to the trip, accepted it because of the pleasure and enjoyment the taking of it was expected to afford. Any other benefits accruing from the trip either to the Company or to the petitioner were at most nominal, and the district court properly concluded that they played no significant part in the motivation either of the Company or of petitioner. Those findings of fact, affirmed by the court of appeals, are binding here.

II

ON THE FACTS FOUND BY THE DISTRICT COURT, THE COST OF THE TRIP WOULD NOT HAVE BEEN DEDUCTIBLE BY PETITIONER IF PAID BY HIM

Since the deductibility issue does not arise unless the value of the trip is first held to be includible in petitioner's gross income, it is perhaps more logical to consider first, as does petitioner, the gross-income question. Nevertheless, there are advantages of exposition in dealing first with the question of deducti-

[7] Moreover, at the time of the trip, petitioner had recently recovered from a cancer operation (R. 24, 37), and he decided to take the trip only after consulting his doctor (R. 33), circumstances that make it entirely implausible that any animus towards him would follow from his refraining from the trip.

bility, and we shall proceed in that order. The deduction question can be most sharply put by assuming that petitioner had paid for the trip (otherwise arranged by the Company) out of his own funds. If a deduction would be allowed in that case, then it follows as of course that petitioner is entitled to an offsetting deduction here if the value of the trip furnished by the Company is included in his gross income. He cannot be worse off when the Company gives him the trip in kind than he would be if it had increased his cash compensation in an equivalent amount and he had paid for the trip himself.

As we have said, we do not believe there is any dispute that the cost of the trip would not be deductible by petitioner if the Court accepts the findings of the district court that the primary reason the Company sponsored the trip, and petitioner took it, was the pleasure and enjoyment it would give to him and his wife. Petitioner acknowledges that the "ultimate issue" on the deduction issue "is the dominant motive and purpose of Petitioners in attending the convention. Did they attend primarily for reasons of business or personal pleasure?" (Br. 36). Petitioner asks the right question but of the wrong body. The question must be, and has been, answered by the trial court, and the answer there given, not clearly erroneous, is the end of the case. We will, nevertheless, go on to show that the facts found by the district court are, under the statute and regulations, the controlling facts and then point out the infirmities in petitioner's argument even on the facts as he assumes them.

1. The statutory basis for the deduction claimed is § 162(a):

> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business * * *.

The regulations[8] provide generally that only such traveling expenses "as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted," and that the expenses of a trip "undertaken for other than business purposes" will be deemed "personal" and nondeductible. Regs., § 1.162–2(a). The regulations also specifically recognize that the cost of attending a "con-

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[8] Treasury Regulations on Income Tax (1954 Code). Petitioner expresses some doubt whether the regulations under the 1954 Code, not promulgated until April 3, 1958, are technically applicable to this case, involving a 1956 tax year (Br. 30–31). The Treasury Decision promulgating the regulations (T.D. 6291, 1958–1 Cum. Bull. 63) describes them as being "for taxable years beginning after December 31, 1953," and since the power to make them prospective only (§ 7805(b)) was not exercised, they are applicable here. Little turns on the question, however, since the same result would be reached under the prior regulations—or, for that matter, under the terms of the statute itself.

Petitioner's reliance on § 7807, relating to stop-gap regulations, is misplaced. That provided simply for the continued applicability of the old regulations under any provision of the Code which "depends for its application upon the promulgation of regulations", and § 162(a) is not of that type.

vention or other meeting" may be deductible but emphasize that whether it is or not depends upon "whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that he is benefiting or advancing the interests of his trade or business by such attendance." Regs., § 1.162–2(d).[9] They add, somewhat unnecessarily, that no deduction is allowable if the convention "is for political, social or other purposes unrelated to the taxpayer's trade or business." *Ibid.*

The problem posed by trips that are taken for a combination of reasons—both business and personal—is specifically dealt with in § 1.162–2(b) of the regulations. That provides that if, on a trip, the taxpayer "engages in both business and personal activities," the travel expenses "to and from" the destination are deductible only if the trip is related "primarily" to business. If the trip is "primarily personal in nature," the "to and from" expenses are not deductible, though of course any expenses actually incurred at the destination that are allocable to the trade or business may independently be deducted.[10] The regulations further recognize that the question

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[9] Since the cost of attending conventions is admittedly deductible if the necessary business purpose is shown, petitioner's recitation of the numerous kinds of conventions for which deductions have been allowed (Br. 33–34) proves nothing. The issue here is whether *in this case* the "convention" was attended for business reasons, and the district court found it was not.

[10] There is no claim here of any such specific business expenses incurred at the destination, and the only question is whether the trip as a whole qualifies for deduction.

whether a trip is "primarily" related to business or is "primarily" personal is a question of fact, in the resolution of which the relative amounts of time spent on the trip in business and personal activities "is an important factor." § 1.162-2(b)(2).

The "primary" purpose test of the regulations, it may be seen, is not significantly different from this Court's suggestion in *Duberstein* that, in determining the "reason" for a payment for tax purposes (though there for purposes of the "gift" exclusion), in a context in which there may be mixed motives, it is the "dominant" reason that controls. The implications of that test, however, deserve a brief comment. In a case in which the business reasons are not only a necessary but a sufficient cause for the trip—*i.e.*, it would have been necessary to take the trip for the business reasons alone—it seems essentially irrelevant that the taxpayer also anticipates deriving pleasure from the trip. That is, when business necessities are alone a sufficient reason for a trip, they should be given "primacy," and there is no occasion for the courts (just as there was none for the taxpayer) to weigh the additional personal reasons that might have made the taxpayer happy, if not eager, to go.

The difficult case is the one in which the taxpayer has some business which he can further on the trip but would not take the trip for that reason alone. It is only because he can kill two birds with one stone—further his business and have a good time—that he considers the trip worth the cost. It is obvious that a taxpayer ought not be allowed to deduct

a $1000 trip because he sought and obtained a business advantage worth $100; yet it seems harsh to deny any deduction if the business advantage was worth most, but not quite all, of the cost of the trip (say, $800). In a perfect world, the conceptually ideal solution might be to determine the "worth" to the taxpayer both of the business benefits and of the non-business benefits and to allocate the cost accordingly. But such precision of measurement is a vain hope and the pragmatic necessities of the tax system require a blunter instrument. Thus the all-or-nothing solution adopted by the regulations and by this Court in *Daberstein*—total allowance or disallowance[11] depending upon which cause had the greater force in motivating the trip, though perhaps only by a narrow margin—seems the only feasible solution. And against the theoretical inequity of denying deduction of any part of the $1000 cost of the trip when the pleasure is afforded was subjectively "worth" to the taxpayer only, say, $700 (*i.e.*, that's all he would have paid for that reason alone), there can be offset the boon he realizes when he is allowed to deduct the full $1000 cost though the business advantage is worth only $700. In short, acknowledging the theoretical imperfections of the "primacy" test, it remains the only workable and practical solution to a

[11] Except, of course, for specific business expenses incurred at the destination, which are allowable even if the trip as a whole was "primarily" for personal reasons. We are concerned here only with the deductibility of the cost of the basic trip—the "to and from" expenses and meals and lodging. See Regs., § 1.162-2(b)(1).

problem not susceptible of precise or mechanical treatment.

On the question of whose motivation is controlling—the employer's or the employee's—there is again no substantial disagreement between the parties. Initially, as petitioner agrees (Br. 39), the question is necessarily why did the person claiming the deduction (the employee) incur the expense. Since, however, it is the "business" of an employee to further the interests of his employer, we agree with petitioner (Br. 39–40) that a purpose to advance his employer's interests is a business purpose as to the employee. Thus, since the reason an employer requests an expenditure will normally be to advance his (the employer's) interest, it is normally sufficient that an expense is incurred at the behest of the employer. The necessary limitation, of course, is that if the employer's purpose is to advance not his own interests but the employee's—*i.e.*, to confer a benefit upon the employee—the employee's participation in the endeavor of conferring a benefit upon himself can hardly be a business purpose as to him. If, as petitioner puts it (Br. 40), the employer's "business" purposes are to be "attributed" to the employee, so must his purpose to benefit the employer.

Upon the facts found by the district court in this case, the application of those undisputed legal standards poses no difficulty. The court specifically found that the Company's primary reason for sponsoring the trip was to confer a benefit upon petitioner as a reward for his sales efforts, a purpose which, even if "attributed" to petitioner, is plainly not a "business"

purpose as to him. Nor did petitioner have an independent business purpose of his own [12] in taking the trip, for the court specifically found that his primary reason for going was to further his own pleasure. While both the Company and the employee may have anticipated various other benefits from the trip in addition to petitioner's pleasure, it is the "primary" or the "dominant" reason for the trip that controls (Regs., § 1.162–2(b)), and those findings are thus conclusive of the issue. The trip having been "undertaken for other than business purposes" (Regs., § 1.162–2(a)), the cost of the trip is not deductible.

2. In the event that the district court's findings are to be set aside, either in whole or in part, it is necessary to go on to consider the questions raised by petitioner's view of the facts. Petitioner's main argument, contrary to the findings,[13] is that he was "compelled" to go on the trip, whether he liked it or not (Br. 41–44). Specifically, he asserts that the Com-

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[12] An employee may, of course, also have business expenses that are incurred, not to further his employer's interests, but to further his own interests as an employee, possibly antagonistic to his employer's. An example is union dues, which are deductible by the employee because incurred for his independent business objective of, *inter alia*, obtaining higher wages through collective bargaining. A trip to the home office to protest a severance notice might be in the same category. Or, in the context of this case, even though the Company provided the trip solely to confer a benefit on the agents, one of the agents might still be able to establish that he had an independent business reason for going to New York (*e.g.*, to close an important insurance sale).

[13] And, indeed, to petitioner's own testimony that he would go again "tomorrow" if offered the trip on an expense-paid basis (R. 43).

pany "looks with serious displeasure upon any agent or his wife who, without good reason, does not attend" (Br. 5); that, while not proclaimed as an "edict", the Company's implicit "command" that he attend was no less effectively conveyed by the "subtle" ways "of modern business"; and that failure to attend would place "his economic security and association with the Company in jeopardy" (Br. 43). Not showing up at the boss's party is, we acknowledge, not the best way to get ahead in the world, but we take it that petitioner implies a somewhat more direct relationship here between his attendance and his opportunities for advancement. And, while we deny it to be a fact, we will assume, for purposes of this discussion, that petitioner would in fact have lost his job had he not taken the trip. For, even so, we disagree with the legal significance petitioner would attribute to that fact.

At first sight, it might seem that nothing is more related to the "business" of being an employee than that which is, in the phrase quoted by petitioner from Judge Brown's dissent (Br. 43), "indispensable" to keeping the job. Reflection, however, reveals the deficiencies of that "but for" reasoning. In what petitioner calls "the ways of modern business" (Br. 43), there are many things that it may be essential to do to keep one's job: dress well, belong to the right club, live in an expensive neighborhood, entertain generously, or go on hunting trips with the boss. The extent to which the "corporation" sometimes impinges upon and controls the private life of the "organization man" is, indeed, emphasized in Judge Brown's dis-

senting opinion in the *Thomas* case (see petition for certiorari, pp. 64–70). With but slight extension, therefore, the implicit premise that whatever the corporation demands the employee may deduct could readily be applied to substantially all personal and living expenses. Plainly that cannot be the law. One cannot deduct commuting expenses because his employer requires him to come to work (and go home to sleep) to keep his job (Regs., § 1.162–2(e)); the cost of his expensive clothing because his employer requires him to dress well; the cost of being active in community affairs because his employer expects it of him; the cost of a trip to Bermuda because his employer insists that he take his vacation away from the tribulations of home life, the better to perform his work upon return; or the cost of food or shelter because one must eat and sleep to work. So plain, indeed, is the error in petitioner's but-for reasoning, that the problem is not to prove it wrong but to suggest how the obviously necessary limitation on "ordinary and necessary" business expenses is to be drawn.

There are two approaches to answering petitioner's syllogism. The first is to say that, even if such expenditures would otherwise qualify for deduction under § 162, they are made nondeductible by § 262, which directs that:

> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

The other, and more direct, approach is to say that simple but-for causation does not *per se* mean that an expense is "ordinary and necessary" within the

meaning of § 162. The expense, this Court has said, must bear a "direct and proximate" relationship to the business.[11] While "direct" may imply no more than the immediacy of the casual relationship, "proximate" suggests that the question turns also on the *kind* of relationship, and some qualification of that sort is obviously essential. It is not enough that an expenditure is essential to one's business in a but-for sense; it must also contribute to the business objective in a certain way. The statutory warrant for such a limitation is to be found in the restriction of deductions to "ordinary and necessary" expenses: that an expense is "necessary" is not, as petitioner assumes, the only test; it must also be "ordinary", a test which implies that not any kind of business relationship is adequate.

Admittedly, what kind of business relationship is necessary to qualify an expense for deduction is not a question to be answered by a neat formula. The question is one for the exercise of "judgment," guided by little more than the necessities of an equitable,

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[11] See *Kornhauser* v. *United States*, 276 U.S. 145, 153; *Bingham's Trust* v. *Commissioner*, 325 U.S. 365, 370, 374. In reporting the substantially equivalent provision adopted in 1942 (now § 212) permitting deduction of "ordinary and necessary expenses" incurred "for the production or collection of income" (*i.e.*, by persons not technically engaged in a "trade or business"), the House committee report similarly observed that, to be deductible, the expenses "must be ordinary and necessary * * * and must bear a reasonable and proximate relation to the production or collection of income * * *." H. Rep. 2333, 77th Cong., 2d Sess., p. 75.

pragmatic, and workable tax structure, and the line can be pieced out only by the case-by-case process of inclusion and exclusion. For present purposes, however, it is sufficient to say—whether derived from § 262 or from an interpretation of § 162—that "personal" and "living" expenses are not made deductible by the fact that nature or one's employer requires that they be incurred in order to keep one's job. As we have previously suggested, if an employer "orders" an employee to go to Bermuda for a needed rest, the better to perform his job on his return, the "vacation" remains a nondeductible "personal" expense notwithstanding that he would have lost his job had he not taken the trip. By the same token, the fact that petitioner's employer in effect "ordered" him to go to New York (even if true) is not *per se* a basis for deduction. It remains a "personal" expense if the employer arranged the trip primarily for the pleasure of the agents and if, apart from the alleged compulsion, petitioner had no independent business reasons for going. "Compulsion" as such is not the key to deductibility.[15]

3. Petitioner also asserts that one of the reasons he took the trip was the opportunity it offered for informal exchanges with other agents and officers about

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[15] That is not to deny that the fact that an employer "requires" a thing to be done is relevant for the light it casts upon the employer's reasons for wanting the act done—*i.e.*, whether it is true or not that the employer's primary interest was in the benefit to the employee. For that purpose, however, it is of only evidentiary value. The question discussed here is whether the fact of "compulsion" has, in itself, any controlling legal significance.

the life insurance business (Br. 39–41). He contends that that was as much a business reason as the instruction to be derived at the formal business meeting and that it gave a "business" character to the entire trip—the train ride and the nominally "entertainment" events as well as the business meeting. While the factual premise of that argument is undermined by the finding of the district court that personal pleasure was the primary reason for the trip, we wish briefly to comment also upon its legal premise—namely, that an opportunity to talk to fellow laborers in an informal or social context qualifies, because of the incidental educational benefits of such discussions, as a "business" objective.

Petitioner makes no bones about the sweep of his suggestion. As he says, "When lawyers get together they talk law; when doctors get together they talk medicine; when insurance men get together * * * they talk insurance" (Br. 40). We may grant, and our wives will confirm, that that is true. But the question is whether that is enough to convert an otherwise social event into a business one. "Shop talk" is a part, not of the business, but of the life, of the professional man. Granted that one may learn something valuable from such contacts, ought the tax law attempt to take account of such incidental benefits to one's business? Taxation is a practical matter, and to attempt to separate out and attach tax significance to every element of business advantage accruing from the process of living—in a world in which life and business are often inextricably woven together—is a vain hope. Here again, there is no denying that there is *a*

relationship of the activity to the business, and the question is whether it is of the kind that should be deemed "ordinary" or "proximate" or "direct"—all of which are, in the end, but labels for an essentially pragmatic judgment whether it is consistent with the ends of an equitable and workable tax system to recognize such a relationship as a "business" one and thereby give tax significance to its presence.

In our judgment, "shop talk" should be recognized as a "business" activity only when it is formally organized and channelled, as at formal meetings, round-table discussions, conferences, training sessions, and the like. Beyond that, the task of sorting out the business from the social is hopeless, for the simple reason that "shop talk" is in fact all-pervasive. Our position, we wish to emphasize, is not that as a matter of *fact* the relationship of informal "shop talk" to the business does not exist. It is rather that as a matter of *law* it ought not be given tax significance—or, in the traditional garb in which such a pragmatic judgment of tax policy is clothed, it does not bear to the business the *kind* of relationship that is implied by "ordinary and necessary." Informal talk about one's main preoccupation in life is, in a real sense, a part of life and it ought to be deemed a "personal" rather than a "business" activity.

In concluding our discussion of the deduction issue, it bears repeating that the two questions last discussed—the legal significance of employer "coercion" and of "shop talk"—are not reached in this case if the

findings of fact are affirmed. The district court found that petitioner took the trip, not because of fear of losing his job if he didn't or because of the opportunity to engage in shop talk—nor even because of both of those reasons combined with the training value of the formal morning session—but, plainly and simply, for his own pleasure. Thus whether the former reasons should be characterized as "business" reasons is irrelevant. Even if those reasons were present to a degree, it remains the "primary" or "dominant" reason that controls, and that reason, found by the district court, was pleasure. The cost of a trip undertaken primarily for pleasure is not deductible.

III

THE VALUE OF A TRIP PAID FOR BY AN EMPLOYER PRIMARILY TO CONFER A BENEFIT UPON AN EMPLOYEE IS INCLUDIBLE IN THE EMPLOYEE'S GROSS INCOME

Should the Court decide that the cost of the trip here would have been deductible by petitioner if paid for by him, there would be no need to reach the gross income question since petitioner would in any event be entitled to an offsetting deduction. We have no wish to argue, or have the Court decide, the teasing but here unimportant question whether the proper theoretical treatment of such an item is to exclude it from income in the first place or to "run it through" the taxpayer's income with an offsetting deduction. Accordingly, we confine our discussion here to things provided by an employer for an employee which are of a nature that their cost would not have been

deductible had the employee provided them for himself.

By and large, the deductibility question and the includibility question are opposite sides of a coin and ought to be consistently decided. To deny a deduction to one employee who provides the thing for himself while not taxing another employee on the receipt when his employer provides it for him is a discrepancy conceptually difficult to justify, and its scope ought, therefore, be narrowly confined. Exist it does, however,[18] and we must accordingly deal separately with the income question even if the Court agrees that the cost of the trip would not have been deductible if paid for by petitioner.

1. Petitioner's argument on the income question (Br. 16–27) begins as though he were suggesting that the value of the trip cannot be included in income because of the nature of the receipt—ultimately "psychic" inasmuch as it can be realized only by being consumed and therefore has no *transferable* value. In the end, however, he recognizes that that is too broad an umbrella and that the question must turn, not upon the nature of the receipt, but upon the employer's reasons for conferring it. Thus his initially sweeping proposition is soon confined to benefits in kind "not conferred on an employee as

[18] The primary example is that of the so-called "fringe benefits" which, primarily for pragmatic reasons, have generally not been required to be included in income even though the employee could plainly not deduct the cost if he provided them for himself (*e.g.*, a parking space, incidental medical services, a tie or bottle of whiskey given at Christmas, etc.). See pp. 39–45, *infra*.

compensation" or "conferred by his employer without intent to compensate." (Br. 17); benefits not "intended as compensation" (Br. 20) or the receipt of which is "merely incidental to the dominant business purposes of the employer" (Br. 21); cases where "the underlying objective of the employer is not to compensate the employee but to further the business of the employer" (Br. 23); etc. In turn, he recognizes that "intent" as used here refers, as *Duberstein* teaches, to the "dominant reason that explains his [the employer's] action in making the transfer," and concludes that the question of "vital significance" here is, therefore, the "dominant reason of the Company in paying the convention expenses of Petitioners" (Br. 25). We agree, and thus the real dispute here, as we have previously suggested, is over the question of fact: what was that reason? That question was answered by the district court, which found that the Company's dominant reason for providing the trip was to confer a benefit upon the employees because of their past services (*i.e.*, their meeting of the production quotas). That is precisely what is meant by an "intent to compensate" and, if those findings are not clearly erroneous, that is the end of the case.

2. Despite what seems to be the parties' ultimate agreement about the controlling legal standard, it is appropriate to answer petitioner's initial, though soon abandoned, argument that what must be consumed cannot be taxed, for in dealing with such basic questions as "What is income?" the process of rea-

soning is no less important than the end result in the particular case.

Petitioner derives his thesis primarily from the existence of a class of so-called "fringe benefits" provided by employers the value of which has not generally been considered income to the employees even if the employer's sole reason for providing them is to confer a benefit upon the employees—*e.g.*, provision of parking facilities, medical services, swimming pools, libraries, courtesy discounts, etc. Since there is no express statutory exclusion for such receipts, petitioner contends that the existence of "non-statutory exceptions" to the broad scope of "income" cannot be denied. Seeking to find, from the "nature" of such items, a logical explanation for their exclusion, he then draws the principle that benefits that can be realized only by being consumed are in their nature not "income" within the meaning of § 61(a).

Notwithstanding the broad reach of the gross-income definition as construed by this Court, we recognize, with petitioner, that there may indeed be non-statutory exceptions. We also acknowledge that, by and large, the items mentioned by petitioner, as well as some others, have not generally been held taxable.[17] Our disagreement is over the rationale of

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[17] As petitioner points out (Br. 22), the withholding regulations (Regs., § 31.3401(a)-1(b)(10)) provide:

> Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called "courtesy" discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as wages subject to withholding if such facilities or privileges are of rela-

their exclusion and with petitioner's attempt to draw from them a universalization about the "nature" of income. We will, accordingly, spell out our view of how income has been defined by this Court and the way in which non-statutory exceptions are to be explained.

3. "Gross income" was defined in § 22(a) of the 1939 Code as including "gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid" and, more generally, "gains or profits and income derived from any source whatever." (The lan-

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tively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment or efficiency of his employees.

A similar exception is recognized by Rev. Rul. 59–58, 1959–1 Cum. Bull. 17, which held that the value of turkeys, hams, or similar merchandise given employees at Christmas or some other appropriate holiday is not income. By slight extension, that would also include other kinds of ritualistic "presents" given in kind, such as a gold watch given an employee after 20 years' service.

An exception of a rather different kind was recognized by this Court in *Commissioner*, v. *Glenshaw Glass Co.*, 348 U.S. 426, 432, n. 8, where the Court referred, without apparent disapproval, to the "long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital" (citing rulings including damages not only for physical injuries but also, *e.g.*, for breach of promise to marry). Since under the strict "logic" of the tax law even a return of capital is a "gain" to the extent that it exceeds basis (and an arm or a promise to marry has no basis), those rulings seem ultimately to be "exceptions" to the principle, taken literally, that all "gains" are income. The subject matter of those rulings, we note, is now covered in part (personal injury damages) by the Code (§ 104).

guage was simplified in § 61(a) of the 1954 Code, but with no intended change of substance (see note 19, *infra*).) Despite that sweeping language, and starting with the famous definition in *Eisner* v. *Macomber* which seemed to limit income to "gain derived from capital, from labor, or from both combined" (252 U.S. 189, 207), the courts were burdened for many years with almost metaphysical disputes over the "nature" or "sources" of income. In a course of decisions culminating in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426,[18] however the Court swept away that sterile focus of controversy and gave a new and full recognition to the broad sweep of the statutory definition. By it, the Court concluded, Congress imposed "no limitations as to the source of taxable receipts, nor restrictive labels

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[18] The issue in *Glenshaw Glass* was whether punitive damages received for fraud and antitrust violations were taxable. The taxpayer contended that he was simply the fortuitous beneficiary of a penalty imposed upon the defendant for his culpable conduct to vindicate public policy, and hence that the receipt was essentially a "windfall" to it not within the *Eisner* v. *Macomber* definition of a gain derived from "capital" or "labor." The Court accepted that characterization of the "nature" of the receipt and based its decision broadly on the irrelevance of such conceptual characterizations of the "nature" and "sources" of receipts as the determinants of what is income.

In a companion case, *General Investors Co.* v. *Commissioner*, 348 U.S. 434, the Court held taxable, for the same reason, "insider profits" paid over to a corporation under § 16(b) of the Securities and Exchange Act.

While on their facts both of those cases are far removed from this case, the landmark significance of the opinion in *Glenshaw Glass* derives, as we will show, not from the particular result in that case but from the way in which the Court approached the gross income question.

as to their nature," and meant "to tax all gains except those specifically exempted" (348 U.S. at 429–430).[19] Specifically in the context of benefits conferred by employers or employees, moreover, the broad scope of "income" had already been emphasized in *Commissioner* v. *Smith*, 324 U.S. 177, 181, where the Court had recognized that the term "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." And since *Glenshaw Glass* the Court has repeatedly reaffirmed the virtually all-inclusive scope of "gross income." *E.g.*, *Commissioner* v. *Lo Bue*, 351 U.S. 243, 246; *James* v. *United States*, 366 U.S. 213, 218.

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[19] While the case actually involved § 22(a) of the 1939 Code, the Court noted that § 61(a) of the 1954 Code, though simplified in language, was of the same scope. 348 U.S. at 432. The committee reports on the 1954 Code not only confirm the identity but also confirm the broad interpretation given to the income definition. The Senate committee stated:

> This section corresponds to section 22(a) of the 1939 Code. While the language in existing section 22(a) has been simplified, the all-inclusive nature of statutory gross income has not been affected thereby. Section 61(a) is as broad in scope as section 22(a).
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> Section 61(a) provides that gross income includes "all income from whatever source derived." This definition is based upon the sixteenth amendment and the word "income" is used as in section 22(a) in its constitutional sense. It is not intended to change the concept of income that obtains under section 22(a). Therefore, although the section 22(a) phrase "in whatever form paid" has been eliminated, statutory gross income will continue to include income realized in any form. * * *

S. Rep. 1622, 83d Cong., 2d Sess., p. 168; see also H. Rep. 1337, 83d Cong., 2d Sess., p. A18.

Notwithstanding its broad language, however, we acknowledge that, just as this Court in *Glenshaw Glass* said of *Eisner* v. *Macomber* that it was never "meant to provide a touchstone to all future gross income questions" (348 U.S. at 431), so also was *Glenshaw Glass* itself not meant as the final answer to "all future gross income questions." It is too simple a syllogism to say that there was a "gain" of some "nature" or "form"; it is not within a specific statutory exclusion; therefore it is income. Just as it would be unworkable on the deduction side to try to account for every kind of expenditure having a relationship to the business, so also on the income side it is quite impossible to try to account for every kind of receipt. If an employee is given a parking place for which another employee would have to pay, there is no doubt that he has received a benefit from his employer—nor, indeed, that the employer's very purpose in providing the facility may have been to confer such a benefit. The same "logic" that insists that a deduction must be allowed for every business-contributing expenditure would, therefore, equally insist that such a receipt must be taxed as income. The answer here, as there, is not one of logic but of judgment: taxation is a practical matter, and it would be quite senseless, not to say futile, to attempt to require an accounting for every such receipt. The goal is, not the perfect, but the possible, the practical, the workable.

Recognition that there may be non-statutory exceptions to gross income does not, however, deny the

significance of *Glenshaw Glass*. Its significance lies, not in the pronouncement of absolutes, but in its shifting of emphasis and negation of the former criteria. *Eisner* v. *Macomber* had attempted to define income affirmatively, or by inclusion: a gain was not income unless its "nature" brought it within pre-conceived categories. *Glenshaw Glass* reversed the approach and defines income negatively, or by exclusion: a gain is income unless within a recognized exception. Instead of "excluded unless specifically included" we now have "included unless specifically excluded." It is the exclusion, rather than the inclusion, that must be justified; unless there is a sufficient justification (either statutory or as a policy judgment) for excluding the item from income, it is to be included. There is thus put an end to metaphysical disputes over the "nature" or "sources" of income, and the emphasis is placed, where it belongs, on the question whether there are sufficiently strong reasons of tax policy for excluding any particular kind of receipt.

Once *Glenshaw Glass* is read, not in a search for absolutes, but for its refocussing of the relevant criteria, there is, of course, no difficulty in explaining the non-statutory exceptions to income. For the denial in *Glenshaw Glass* that a receipt need not be "derived" from "labor" or "capital" or come within some other pre-conceived category to be income is not a denial of the necessity of accommodating the reach of the statute to the needs of a workable and palatable tax system. In turn, there are more than ample policy justifications for the Commissioner's judg-

ment[20] that the kind of "fringe benefits" to which petitioner refers ought not be included in income: the administrative difficulties of achieving uniform enforcement and thus equality of treatment among taxpayers; the burden upon taxpayers in requiring them to account for such receipts; the relative insubstantiality of the amounts involved; the fact that they are received in kind; the common understanding and attitudes of taxpayers; etc.[21] Such items are not "income," in short, for the simple reason that, as a matter of sound tax policy, it is not sensible to treat them as income.

Petitioner's essential error, therefore—both on the deduction question and the income question—is that he denies the role of pragmatic policy judgments in carving out the scope of what is "ordinary and necessary" and of what is "income" (questions which, as we have emphasized, are essentially opposite sides of

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Needless to say, on a question of that sort (ultimately one of "policy," however clothed) the deference to be paid to the agency primarily charged with the task of administration is necessarily great.

[21] We do not mean to suggest that the room and necessity for the making of such judgments is necessarily limited to considerations of "feasibility." Perhaps even such an imprecise consideration as the "felt" inappropriateness of taxing a particular kind of receipt might justify recognizing an exception. That may, indeed, be the most satisfactory explanation of the rulings cited in *Glenshaw Glass* that compensatory damages for personal injuries are not "income." See note 17, *supra*. It is simply felt to be offensive to tax as income the proceeds of a lost leg or of an injured heart, from which one "infers" that Congress could not have "intended" (or, more accurately, would not have if it had thought about it) to include that particular kind of receipt.

the same coin). He insists rather upon a rule of logic in which the results must turn upon the "nature" of the thing, which is, of course, the very kind of conceptual approach to gross income problems that this Court condemned in *Glenshaw Glass*. The great contribution the Court there made, and which petitioner would have the Court undo, was its recognition that the problem of what is income (and, by equivalence, what is a "business" expense) is, in the end, a practical one to be solved, not by a search for the "nature" of income, but by pragmatic judgments solidly grounded in the needs of a workable and equitable tax system.

4. Quite apart from the basic error in petitioner's approach to the question, the thesis he suggests that what is realized only through consumption is not income is demonstrably unsound (as, indeed, petitioner himself ultimately recognizes by implicitly adding the "if not intended as compensation" qualification).

If a corporation furnishes a house for its president, the rental value of the house is obviously a benefit that the president can realize only in the process of using it. Yet we doubt that anyone will disagree that the rental value of the house ought to be taxable to the president as compensation, and such is the law.[22] Similarly, the value of meals and lodging can be realized only through consumption, yet petitioner

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[22] See *Chandler* v. *Commissioner*, 119 F. 2d 2d 623 (C.A. 3); *Dean* v. *Commissioner*, 187 F. 2d 1019 (C.A. 3); *Heyward* v. *Commissioner*, 36 T.C. 739, appeal pending (C.A. 4). Cf. *Alabama-Georgia Syrup Co.* v. *Commissioner*, 36 T.C. 747, 757–759, 771, 778 (use of company recreational lodge for personal purposes by the company president).

acknowledges (Br. 19–20), as he must, that the necessary implication of the specific statutory exclusion (§ 119) of meals and lodging "furnished for the convenience of the employer" if, "but only if," narrow conditions are met is that the value of meals and lodging not meeting those conditions is includible in income, and the regulations specifically so provide (§ 1.61–2(d)(3)). The contention is answered in even broader terms by § 1.61–1(a) of the regulations, which provides:

> * * * Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash.

Since "services, meals, [and] accommodations" are all things the receipt of which is by consumption, petitioner's thesis that what must be consumed cannot be taxed could be upheld only by invalidating the long-standing [23] regulations.[24]

For a contrary result (though based on the "gift" exclusion rather than the "income" definition), see the decisions of the Fifth Circuit in *Richards* v. *Commissioner*, 111 F. 2d 376 (Judge Sibley dissenting), and *Peacock* v. *Commissioner*, 256 F. 2d 160, holding that the value of a house furnished by a corporation to its president and (with his wife) sole stockholder was a "gift," which suggests this intriguing question: if a corporation can make a "gift" to its *sole* stockholder, what then is a dividend?

[23] The regulations under the 1939 Code were to the same effect. Regs. 118, § 39.22(a)–3.

[24] Petitioner's rationale also, we might point out, fails to account for "fringe benefits" received in the form of transferable property (*i.e.*, not realizable only through consumption), such as the bottle of whiskey given by an employer to his employees at Christmas. See Rev. Rul. 59–58, 1959–1 Cum.

Finally, petitioner's argument is condemned by its own breadth, for its necessary implication is that the tax on compensation could be avoided by a corporation undertaking to provide directly for its employees all their personal and living needs—home, meals, servants, and transportation as well as vacations. That is not and cannot be the law. If a corporation pays for an officer's vacation in Bermuda, doing so solely for purposes of conferring a benefit upon the officer, the result must be, if the tax laws are to have a practical rather than a theoretical operation, that the value of that trip is taxable to the officer as compensation.[23] That is what the district court found here and if those findings are not clearly er-

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Bull. 17. Nontaxability of such receipts cannot be accounted for under the "gift" exclusion, since the "dominant reason" for giving them is likely to be simply to promote employee good will, not "disinterested" generosity or personal "affection" as required by *Duberstein*. They are nontaxable, rather, for the same reason the parking space is nontaxable: not because they must be consumed to be received (not true in the case of the whiskey), but simply because of the pragmatic judgment that it is not feasible to attempt to tax, or require reporting of, such relatively nominal receipts in kind.

[23] There is here, as on the deduction question, the same problem of accounting for mixed motives. As there, the only practical solution, since an allocation is hardly feasible, is to make the "dominant" or "primary" reason controlling, the solution adopted in the regulations and in *Duberstein*. Petitioner also makes the same "compulsion" argument on the income question as on the deduction question, and our answer is the same. If being "required" by an employer to take one's vacation at a restful place, the more vigorously to return to work, is not the kind of "business" reason that ought to be recognized as a basis for deducting the cost of an otherwise "personal" trip, the same policy considerations require that such a trip, when paid for by the employer, be treated as income.

roneous, the value of petitioner's New York trip must be taxed to him as income.[26]

5. There remains a final conundrum: Why, as we and petitioner ultimately agree is the case, should the taxability of an employee's receipt turn upon the employer's reasons for providing it? If an employer sends an employee to Paris for a two-week stay, the benefit to the employee is very likely the same whether the employer's reason for sending him was to have some papers signed or simply to confer a

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[26] Since petitioner had performed services for the Company and the district court found that the trip was given him because of those services, there is no dispute in this case that the receipt is properly to be characterized as "compensation" (§ 61(a)) if it was not taken for independent "business" reasons and if receipts by consumption are not in their "nature" outside the definition of income.

We may note, however, that the receipt also bears the earmarks of a "prize" or "award", which § 74 of the Code (with exceptions not material here) specifically includes in income whether or not services have been performed. That provision was a legislative overturning of such decisions as *Washburn* v. *Commissioner*, 5 T.C. 1333, holding that a $900 "prize" given by a radio show to a person picked at random from a telephone book was not taxable because the recipient had performed no services and hence the receipt had not been "derived" from "labor" or "capital." (The result in that and similar cases was stated in terms of the receipt being a "gift," but the derivation from *Eisner* v. *Macomber* shows that the real basis for decision was that the receipt was a "windfall" not falling within the *Eisner* v. *Macomber* definition of income; the distinction between "windfalls" and "gifts" did not become important until the "windfall" implications of *Eisner* v. *Macomber* were rejected in *Glenshaw Glass*.) See H. Rep. No. 1337, 83d Cong., 2d Sess., p. A27; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 178. As noted above, however, since the trip here was admittedly given for services if it was not for "business" reasons, we have no need to rely on § 74.

benefit upon the employee. Why do we tax the value of the trip in one case and not in the other? The answer to that question—as to all other questions of what is "income" or what is "ordinary and necessary"—is ultimately pragmatic. For reasons cogently stated by petitioner (Br. 17–18, 23, 26), it would be obviously impossible to attempt to measure, as a basis for taxation, the "psychic" pleasure one derives in the course of performing his duties as an employee. Yet when the employer provides the trip, not for independent business reasons, but for the very purpose of conferring a benefit on the employee, the policy considerations point the other way and require that we not permit such a gaping loophole through which the fruits of one's labor may escape taxation.

In doing so, however, we make no pretense that we can measure the employee's psychic pleasure from the "vacation" trip any more than we can his pleasure from the "business" trip. What is taxed is the objective "fair market value" of the trip (Regs., § 1.61-2(d)(1)), and the possibility that it may not have been "worth" that amount to the particular recipient (he would have preferred to have had a smaller sum in cash rather than the trip in kind) we accept as one of the necessary imperfections of, not an ideal, but a workable tax system. Taxing the employee on the "fair market value" of a compensatory trip even though that is more than its true worth to him is, for that matter, simply the counterpart to not taxing him at all on a "business" trip even though, by exactly the same kind of psychic

measurement, it may have a substantial "worth" to the employee.

In justifying the distinction between trips provided by the employer for business reasons and those provided by him for the very purpose of conferring a benefit upon the employee, some comfort can be drawn from the assumption that, by and large, an employer expects to get his money's worth in paying for a trip. Thus, if an employer pays for a trip for the purpose of conferring a benefit upon the employee, he will usually believe that the benefit to the employee will be "worth" the cost. The same assumption cannot be made about a trip for business reasons, however, since the business reasons require the trip even if it is known that it is a burden rather than a boon to the employee. That is, while the question cannot be made to turn upon a factual determination of the subjective "worth" of a trip to an employee in an individual case, the fact that a trip provided by an employer for the purpose of conferring a benefit upon the employee will in *most* cases be worth to the employee its cost to the employer is a more than sufficient justification for a pragmatic rule taxing the employee on the fair market value of pleasure trips in *all* cases. By a parity of reasoning, the fact that trips necessitated by business reasons will in *most* cases be a burden rather than a boon to the employee justifies the pragmatic rule not taxing the employee on the value of business trips in *any* case.

All of the foregoing goes only to prove, as we stated at the outset, that the income question in this case does turn—as petitioner in effect concedes—upon the

single question of fact: was the primary reason why the Company paid for the trip to New York (a) to confer a benefit upon the agents or (b) to further independent business interests of its own? It was precisely that question of fact that was answered by the district court, and its finding, unless clearly erroneous, establishes that the fair market value of the trip was taxable to petitioner.

IV

THE VALUE OF THE WIFE'S TRIP IS TAXABLE EVEN IF THE VALUE OF THE HUSBAND'S IS NOT

If the value of the husband's trip is taxable (*i. e.*, includible in income without an offsetting deduction), it follows *a fortiori* that the value of the wife's trip is taxable.[27] Even if the district court findings as to the reasons for the husband's trip were to be set aside, however, and his trip were held to have been taken for "business" rather than "personal" reasons, his wife's presence on the trip could still not be found to have served any "business" purpose and the value of her trip would nevertheless be taxable.

1. If the husband had paid the wife's expenses, he would not have been entitled to deduct them even if

[27] Since a joint return was filed, it is immaterial whether the value of the wife's trip is deemed income to her in the nature simply of a "gain" not specifically excludible from income (*Glenshaw Glass*, *supra*) or income to the husband in the nature of "compensation." In our view, however, a trip given to a husband and wife as a reward for the husband's performance of services (as was found by the district court to be the case here) is properly to be deemed income "earned" by the husband, and thus includible in his income, notwithstanding that it is paid in part to a natural object of his bounty.

the trip were admittedly a "business" one as to him. The regulations provide (§ 1.162-2(c)):

> Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. * * *

To avoid obvious abuses, that requirement has been vigorously enforced and the wife's expenses have been allowed only in the unusual case where the wife was actually employed as the husband's secretary or in a similar business capacity.[28] Where the wife was not so employed, her expenses have been invariably disallowed,[29] even though she in fact was

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[28] Deductions were allowed in *Thomas* v. *Commissioner*, B.T.A. memorandum decision, March 14, 1939 (1939 P-H B.T.A. Mem. Dec. ¶ 39,112), where the wife of an opera singer, herself a trained opera singer and linguist, was paid a salary for performing necessary business services for which she was qualified by her specialized education, and (though to the corporation rather than to the husband) in *Walkup Drayage & Warehouse Co.* v. *Commissioner*, T.C. memorandum decision, June 25, 1945 (1945 P-H TC. Mem. Dec. ¶ 45,241), where the wife of a corporation president, having been formerly employed as his secretary, accompanied him on a selling trip and devoted a large portion of her time to secretarial work and assisting in the entertainment of customers.

[29] *Silverman* v. *Commissioner*, 253 F. 2d 849 (C.A. 8); *Alabama-Georgia Syrup Co.* v. *Commissioner*, 36 T.C. 747, 754–755, 768–769, 778; *Guglielmetti* v. *Commissioner*, 35 T.C. 668; *Duncan* v. *Commissioner*, 30 T.C. 386; *Moorman* v. *Commissioner*, 26 T.C. 666; *Basse* v. *Commissioner*, 10 T.C. 328; *Faitoute Iron & Steel Co.* v. *Commissioner*, 11 B.T.A. 818.

of considerable assistance to her husband on the trip,[30] serving as his hostess at a convention over which he presided[31] or helping out in the entertainment and solicitation of clients.[32]

Here, whatever may be said of the finding as to the reason for the husband's trip, the evidence conclusively supports the finding that the wife's presence served no business purpose and that she was invited to, and did, participate in the trip solely for her own and her husband's enjoyment. She was not herself engaged in selling insurance, and her generalized interest in her husband's work—not distinguishable from that of any wife—is not enough to convert the alleged educational value of the trip into a "business" reason for her attendance even if, contrary to the findings, it was a "business" reason for her husband's attendance.[33]

The argument that the Company "expected" the wife to attend, that petitioner did not take that ex-

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See also the Tax Court memorandum decisions in *Campbell* v. *Commissioner*, decided June 8, 1961 (1961 P-H T.C. Mem. Dec. ¶ 61,166); *Moser* v. *Commissioner*, decided February 11, 1959 (1959 P-H T.C. Mem. Dec. ¶ 59,025); *Vanderbilt* v. *Commissioner*, decided December 23, 1957 (1957 P-H T.C. Mem. Dec. ¶ 57,235).

[30] *Moorman* v. *Commissioner*, *supra*; *Vanderbilt* v. *Commissioner*, *supra*; *Campbell* v. *Commissioner*, *supra*. See also *Duncan* v. *Commissioner*, *supra*, where the wife managed a portion of the business at home.

[31] *Sheldon* v. *Commissioner*, decided February 19, 1962 (C.A. 7), 9 A.F.T.R. 2d 782.

[32] *Moser* v. *Commissioner*, *supra*.

[33] See Rev. Rul. 55-57, 1955-1 Cum. Bull. 315; Rev. Rul. 56-168, 1956-1 Cum. Bull. 93.

pectation "lightly", and that petitioner was therefore acting in response to the Company's "command" in taking his wife (Br. 45), is of even less force here than in the husband's case. Its factual premise is destroyed by petitioner's own admission that "I could have gone, yes, without her going" (R. 40). Its legal premise reveals the sweep of petitioner's but-for reasoning. If an employer, perceiving the importance of a wife's moral support to her husband's success, wants its employees' wives brought "into the Company family" (Br. 45) and fears that in their absence their husband's business trips might "degenerate into stag affairs" (R. 53), the husband's taking of his wife with him on trips in compliance with the company policy becomes *ipso facto* a "business" function. It might as well be said that the cost of supporting a wife at home is deductible if an employer, thinking married men more stable or more strongly motivated than bachelors, has a "policy" of hiring or retaining in employment only married men. The contribution of a wife's presence to either the morale or the morality of the employee, which we do not deny may exist as a matter of fact, is not as matter of law the kind of relationship to the "business" that should be deemed to qualify her expenses as "ordinary" business expenses, however "necessary" (because of company "policy") they may be. All wives help their husbands to a degree, and the necessities of practical tax administration require that some more formal or direct kind of relationship to the business exist to warrant deduction of the wife's expenses.

2. It is not challenged by petitioner that if the wife's presence was not necessitated by what are to be recognized as "ordinary or necessary" business reasons, the value of her trip paid for by the Company is includible in gross income. In any event, as we have shown in the discussion of the husband's trip, the same reasons that would prevent the husband from deducting the cost of the trip if borne by him equally require that the value of the trip, when paid for by the employer, be taxed as income.

CONCLUSION

The Court presumably granted certiorari in this case, not simply to review the district court's findings of fact, but because of a belief that there were involved questions of law going to the definition of "income" and "ordinary and necessary" business expenses." For that reason, we have thought it appropriate in this brief to answer fully the suggestions in petitioner's brief which raise, even tentatively, such questions of definition—*e.g.*, the suggestions that what must be consumed cannot be "income" and that expenses that are essential in a but-for sense to keeping one's job are *per se* "ordinary and necessary." In the end, however, we do not believe there is any basic disagreement between the parties over the questions of definition—or at least none that is relevant to the facts of this case as found by the district court.

" The "Questions Presented" as stated in the petition for certiorari, we may note, do indeed seem to raise such questions. Upon close examination, however, it will be found that each of them assumes facts contrary to those found by the district court.

Although petitioner initially suggests sweeping doctrines of the nature of income and of business expenses, he ultimately abandons them and acknowledges that both questions turn upon the reasons why the Company provided and petitioner took the trip. Thus, the suggestion that receipts in the form of the use of services or facilities are not income is soon qualified by adding: if "the underlying objective of the employer is not to compensate the employee" (Br. 23). The suggestion that anything the employer commands the employee may deduct is, similarly, soon limited to commands reflecting a "purposeful business decision" (Br. 42) or made by the employer "for its own legitimate business reasons" (Br. 45) or to expenses which the employees incur "not only because of the implied command but also because their own business is furthered" (Br. 43). Finally, all pretense that a question of law is presented is abandoned by petitioner's express acknowledgment that the "ultimate issue", on the deduction side, "is the dominant motive and purpose of the Petitioners in attending the convention"—"Did they attend primarily for reasons of business or personal pleasure?" (Br. 36)—and, on the income side, the "dominant reason of the Company in paying the convention expenses"—a purpose "to compensate" or "other valid business reasons"? (Br. 24–25).

The questions of fact stated by petitioner to be controlling are precisely those answered, adversely to him, by the district court, which found that the primary reason the Company paid for, and petitioner ac-

cepted, the trip was, not any of the debatably "business" reasons for which petitioner contends, but purely and simply the "pleasure" it would afford petitioner and his wife. By petitioner's own statement of the controlling legal standards, therefore, the trip was taxable to him if those findings are not "clearly erroneous." It follows that the only question actually presented by this case is whether the district court's findings of the admittedly controlling facts (the reasons for the trip) are "clearly erroneous." Unless those findings are first set aside, there is no occasion for the Court to consider or comment upon the questions of definition latent in petitioner's view of the facts and to which the bulk of this brief has been directed.

If the Court agrees with our analysis that the case ultimately presents, not a disputed question of the definition of "income" and "ordinary and necessary" business expenses—as suggested by the petition for certiorari—but instead only a challenge to the district court's findings of the admittedly controlling facts, the case may be simply disposed of. The findings were affirmed by the court of appeals, and even in a review on the merits the concurrent findings of two lower courts are normally accepted by this Court in the absence of a very exceptional showing of error. *Comstock* v. *Group of Investors,* 335 U.S. 211. At the very least, no such showing of "exceptional" error has been made here, and thus the Court need not even undertake an independent examination of the evi-

dence. To affirm the judgment below, in short, the Court need decide no more than the following:

> (1) the district court found as a fact that the primary reason why the Company provided the trip was to confer a benefit upon the petitioner because of his past services (in this instance, selling prescribed amounts of insurance) and that the primary reason petitioner took the trip was, in turn, for personal pleasure;
>
> (2) the value of a trip given by an employer and taken by an employee for those reasons is, as petitioner does not ultimately dispute, includible in the employee's income without an offsetting deduction; and
>
> (3) the question whether the particular findings of fact are clearly erroneous, which now appears to be the only question in dispute between the parties, is, under the two-court rule, not open here in the absence of an exceptional showing of error, a showing that petitioner has failed to make (or, alternatively, the findings are in fact not clearly erroneous).[35]

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[35] For much the same reasons, the pending motion for leave to file an out-of-time petition for rehearing of the denial of certiorari (368 U.S. 837) in *Patterson* v. *Thomas*, No. 109, this Term, should also be denied. Although the court of appeals in that case set aside the district court findings as being "clearly erroneous," it expressly acknowledged the limitations on its scope of review under *Duberstein*, and reversed the findings only after painstakingly cataloguing all of the evidence and concluding that, giving due weight to the findings, it was nevertheless "left with the definite and firm conviction that a mistake has been committed" (quoting *Duberstein*, 363 U.S. at 291). On the facts of that case that conclusion was, we believe, correct. The convention pattern in *Thomas* was remarkably similar in many respects to that here: in addition,

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

JOHN B. JONES, JR.,
I. HENRY KUTZ,
NORMAN H. WOLFE,
Attorneys.

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however, the convention participants in that case did not travel together, so that not even the claim made here that the travel time afforded an opportunity for informal "business" interchanges was available. So long as the court applied the proper standards of review, however—which it clearly did—the question whether, in doing so, it reached the right result on the particular record is not a question warranting review by this Court. Indeed, even in a case here on the merits, this Court has said that if the court of appeals, in setting aside a finding as clearly erroneous, "has made a fair assessment of the record * * *, this Court will not intervene" but will accept the court of appeals' determination, *Peurifoy* v. *Commissioner*, 358 U.S. 59, 61.

APPENDIX

A. Internal Revenue Code of 1954 (26 U.S.C.)

Sec. 61. Gross Income Defined.—(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

* * * * *

Sec. 161. Allowance of Deductions.—In computing taxable income under section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible).

Sec. 162. Trade or Business Expenses.—(a) *In general.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business;

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken

or is not taking title or in which he has no equity.

* * * * *

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.—Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

B. TREASURY REGULATIONS ON INCOME TAXES (1954 CODE)

SEC. 1.61-1. GROSS INCOME.—(a) *General definition.*—Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. * * *

* * * * *

SEC. 1.61-2 COMPENSATION FOR SERVICES * * * (d) *Compensation paid other than in cash.*—(1) *In general.*—If services are paid for other than in money, the fair market value of the property or services taken in payment must be included in income. If the services were rendered at a stipulated price, such price will be presumed to be the fair market value of the compensation received, in the absence of evidence to the contrary.

* * * * *

(3) *Meals and living quarters.*—The value of living quarters or meals which an employee receives in addition to his salary constitutes gross income unless they are furnished for the convenience of the employer and meet the conditions specified in section 119 and the regulations thereunder. For the treatment of rental value of parsonages or rental allowance paid to ministers, see section 107 and the regulations thereunder; for the treatment of statutory subsistence

allowances received by police, see section 120 and the regulations thereunder.

* * * * *

SEC. 1.162-1 BUSINESS EXPENSES.—(a) *In general.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business * * *. Among the items included in business expenses are management expenses, commissions (but see section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles * * * [and] traveling expenses while away from home solely in the pursuit of a trade or business (see § 1.162-2) * * *.

* * * * *

SEC. 1.162-2. TRAVELING EXPENSES.—(a) Traveling expenses include travel fares, meals and lodging, and expenses incident to travel such as expenses for sample rooms, telephone and telegraph, public stenographers, etc. Only such traveling expenses as are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it may be deducted. If the trip is undertaken for other than business purposes, the travel fares and expenses incident to travel are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including travel fares, meals and lodging, and expenses incident to travel, are business expenses. For the allowance of traveling expenses as deductions in determining adjusted gross income, see section 62(2)(B) and the regulations thereunder.

(b)(1) If a taxpayer travels to a destination and while at such destination engages in both business and personal activities, traveling expenses to and from such destination are deductible only if the trip is related primarily to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in busi-

ness activities while at such destination. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible even though the traveling expenses to and from the destination are not deductible.

(2) Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary.

(c) Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip.

(d) Expenses paid or incurred by a taxpayer in attending a convention or other meeting may constitute an ordinary and necessary business expense under section 162 depending upon the facts and circumstances of each case. No distinction will be made between self-employed persons and employees. The fact that an employee uses vacation or leave time or that his attendance at the convention is voluntary will not necessarily prohibit the allowance of the deduction. The allowance of deductions for such expenses will depend upon whether there is a sufficient relationship between the taxpayer's trade or business and his attendance at the convention or other meeting so that

he is benefiting or advancing the interests of his trade or business by such attendance. If the convention is for political, social or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible.

(e) Commuters' fares are not considered as business expenses and are not deductible.

* * * * *

SEC. 1.262–1. PERSONAL, LIVING, AND FAMILY EXPENSES.—(a) *In general.* In computing taxable income, no deduction shall be allowed, except as otherwise expressly provided in chapter 1 of the Code, for personal, living, and family expenses.

(b) *Examples of personal, living, and family expenses.* Personal, living, and family expenses are illustrated in the following examples:

* * * * *

(3) Expenses of maintaining a household, including amounts paid for rent, water, utilities, domestic service, and the like, are not deductible. A taxpayer who rents a property for residential purposes, but incidentally conducts business there (his place of business being elsewhere) shall not deduct any part of the rent. If, however, he uses part of the house as his place of business, such portion of the rent and other similar expenses as is properly attributable to such place of business is deductible as a business expense.

* * * * *

(5) Expenses incurred in traveling away from home (which include transportation expenses, meals, and lodging) and any other transportation expenses are not deductible unless they qualify as expenses deductible under section 162, § 1.162–2, and paragraph (d) of § 1.162–5 (relating to trade or business expenses) * * *. The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses. The costs of the taxpayer's lodging not incurred in traveling away from home are personal expenses

Except as permitted under section 162 or 212, the costs of the taxpayer's meals not incurred in traveling away from home are personal expenses.

* * * * *

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OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH and IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONERS, C. J. D. RUDOLPH AND IRMA M. RUDOLPH

FELIX ATWOOD,
RICHARD A. FRELING, of
TURNER, WHITE, ATWOOD,
MEER & FRANCIS,
1900 Mercantile Dallas
Building,
Dallas 1, Texas,
Attorneys for Petitioners.

WARLICK LAW INC — 2263 VALDINA STREET — DALLAS — ME 1-3130

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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 396

C. J. D. RUDOLPH and IRMA M. RUDOLPH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONERS, C. J. D. RUDOLPH AND IRMA M. RUDOLPH

I.

INTRODUCTION: THE ISSUES CLARIFIED

Respondent seeks to avoid a head-on clash about the statutory concepts of gross income and "ordinary and necessary" business expenses by purporting to concede, at least in part, the validity of the legal propositions espoused in Petitioners' brief. By assuming that all is sweet accord

between the litigants as to the governing legal standards (a rather surprising admission in a context heretofore unexplored by the courts), he neatly reduces the question to whether or not the fact findings of the District Court should be set aside as being "clearly erroneous." We disagree on both scores! We disagree that there are no legal principles for the Court to enunciate. And we would disagree that the only issue is whether or not the fact findings of the District Court are "clearly erroneous", even if we were to accept the assumption that Respondent confirms Petitioners' exposition of the law and the Court should agree with both of us.

It is not stretching a point to say that Respondent, over the years, has strenuously resisted recurrent efforts to narrow, even slightly, the scope of statutory "gross income". At every turn, Respondent has sought to prevent any enlargement of the exceptions to gross income other than those specifically created by statute and, perhaps, by Respondent's own policy decisions. The lesson of this history is pertinent to reading, in their proper perspective, the arguments made in Respondent's brief.

Petitioners recognize full-well the broad reach ascribed to the concept of gross income by this Court. We do not refute the rationale of *Glenshaw Glass*,[1] *Comm'r v. Smith*,[2] and the like, either directly or implicitly; to the contrary, we rely upon those cases as intrinsically embodying the principle that not every gain realized by an employee in an eco-

[1]Comm'r v. Glenshaw Glass Co., 348 U. S. 426, 99 L. Ed. 483, 75 S. Ct. 473 (1955).

[2]Comm'r v. Smith, 324 U. S. 177 (1945).

nomic or psychic sense constitutes gross income. We believe this principle has been recognized in such areas as meals and lodging, certain so-called fringe benefits, and others, but there is little else in the written law which elaborates upon the idea or preciseiy defines its constitution. Obviously, we do not contend that compensation, in whatever form paid, can escape the net of gross income, for this Court has said that it cannot. But we do contend that an employee does not realize taxable income where he is the recipient of some benefit (i) which the employer *did not intend* as additional compensatiton; (ii) there is no undeniable accession to wealth, clearly realized, over which the employee has complete dominion; and (iii) the dominant motive of the employer is to further his business and the thing provided bears a reasonable relationship to that end.

Respondent apparently now agrees with this expression of a non-statutory exception to gross income, and for this we are grateful. However, it is clear that the District Court did not have the benefit of any judicial or administrative pronouncement about the concepts here discussed in the light of which it was to find the facts, and the present ex post facto concession of Respondent affords scant comfort in this regard.

The picture is quite similar on the deduction side of the case. This Court has periodically declared certain fundamental standards which have shaped and molded subsequent determinations as to whether or not expenditures made in the course of a taxpayer's activities constituted "ordinary

and necessary" expenses of doing business.[1] Each case must still be decided on the basis of its peculiar facts and circumstances, but it is apparent that the outcome of each case and the predisposition in which the trier of facts approached his job was affected, sometimes immeasurably, by the broad legal principles laid down by the Court.

The instant case[2] appears to represent the first time that the courts have been called upon to apply the "ordinary and necessary" standard of the statute to expenses incurred by an employee in attending, at the behest of his employer, a convention of similarly situated employees of that employer. What legal significance is to be given to the fact that the employees of a single business concern are gathered together for a purpose, deemed to be a legitimate business purpose, by their employer? Should there not be some legal standard which explains the force and effect to be accorded an employer's demand that an employee participate in a company-planned meeting which the employer believes is related to the business of both the employer and employee? Is the standard to be influenced by whether or not the particular function involved is one accepted in the industry as serving

[1] See, *e.g.*, Welch v. Helvering, 290 U. S. 111, 54 S. Ct. 8 (1933) ("ordinary" expenses are not necessarily habitual or normal expenses in the sense that the same taxpayer will have to make them often. An expense will usually be considered "necessary" if the expenditure is appropriate and helpful in developing and maintaining the taxpayer's business, so the necessity involved in the determination need not be absolute or inexorable); Deputy v. DuPont, 308 U. S. 488, 60 S. Ct. 363, 84 L. Ed. 416 (1940) (it is sufficient if the expense is a common or frequent occurrence in the type of business in which it was incurred); Kornhauser v. United States, 276 U. S. 145 (1927) (the expense must bear a "direct and proximate" relationship to the taxpayer's trade or business); Lilly v. Comm'r, 343 U. S. 90, 72 S. Ct. 497, 96 L. Ed. 769 (1952) (customs of organized professional groups are appropriate in determining whether particular expenditures are "ordinary and necessary").

[2] Along with Patterson v. Thomas, 289 F. 2d 208 (5th Cir. 1961).

defined business purposes? Does a business convention have to be all business? These are not isolated questions appearing here never to be seen again. These are questions which stick out this day and every day in our business community, and with respect to which there is an august need for legal guidance.

Certainly, we stated in our original brief, and affirm now, that the ultimate question with respect to the deduction of expenses is whether or not Petitioners attended the convention primarily for reasons of business or personal pleasure. But how is this question to be answered? In the abstract? This question and the answer thereto have no relevance in the scheme of things except as they relate to whether or not Petitioners' expenditures were an "ordinary and necessary" expense of doing business within the meaning of the statute. The term "ordinary and necessary" has no genetic or natural meaning in the conduct of our affairs, but must be given form and substance in its application under the tax laws. The Court has offered valuable guides in this application, and now it is respectfully requested to refine those guides.

What we are trying to get across is this: The legal concepts involved in a tax controversy both precede and follow the fact determination. The legal concepts set the stage for the fact inquiry and then operate upon the facts once found as the consequences under the law. Where the legal concepts are missing or ill-defined (particularly where they are general or far-reaching, as in the instant case) the fact inquiry may be inadequate in failing to search out particular facts

having legal significance, it may be based upon an erroneous assumption as to the law (which, unless expressed fortuitously in the opinion, only the trier of the facts would know), or it may permit the personal predilections of the trier of the facts to play a more dominant role than that to which they should properly be relegated. There are, at best, shifting and elusive (and, sometimes, illusory) distinctions between "evidentiary facts", "inferences", or "ultimate facts", and matters of "law", and this trichotomy may depend largely upon the attitude with which the case is approached by the trial tribunal and the clarity of the law with which he must deal. The "findings of fact" in this case might have been quite different had Petitioners' view of the law been accepted and known as precedent!

Therefore, our position before the Court in this case is as follows:

1. There *are* questions of law regarding the concepts of "gross income" and "ordinary and necessary" business expenses which the Court should decide.

2. We believe that the analysis and resolution of these questions of law are correctly presented in the brief for Petitioners.

3. The Court has recognized that an exception to the reasons for restraint on appellate review may exist where

See Brown, *Fact and Law in Judicial Review*, 56 Harv. L. Rev. 899 (1943); Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 59 Harv. L. Rev. 753 (1944); Rice, *Law, Fact and Taxes: Review of Tax Court Decisions Under Section 1141 of the Internal Revenue Code*, 51 Colum. L. Rev. 439 (1951).

principles of general application are involved.[6] Here, the principles involved are not only of enormous scope but they touch on aspects of everyday business practice which have never before been analyzed by the courts in relation to the tax laws. Accordingly, we submit that the Court should exercise review without limitation by the "clearly erroneous" rule, and should decide the case on its own.

4. Perhaps as a corollary to the immediately preceding statement, we believe that the trier of the facts based his findings on an erroneous understanding of the law. For instance, the District Court held that its actions were not governed by the "purpose of the insurance company in holding them [the convention]", yet this would seem to be the single most important determination in the case. Again, on established precedent,[7] the scope of review should not be bound by the "clearly erroneous" rule.

5. Only if the Court rejects the foregoing do we come to the question of whether or not the fact findings of the District Court are "clearly erroneous". In such event, it is our position that the findings of fact *are* "clearly erroneous", based upon the record as a whole.

6. Finally, and alternatively, we contend that the findings of fact do not satisfy the requirements of Rule 52(a) of the Federal Rules of Civil Procedure.

Having broadly stated our position, we shall now answer in kind a few key points made in Respondent's brief.

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[6] Rice, *supra* n. 5, at p. 453.

[7] Helvering v. American Dental Company, 318 U. S. 322, 87 L. Ed. 785 (1942); Comm'r v. Brown Shoe Company, 175 F. 305 (8th Cir. 1949); 5 MOORES, FEDERAL PRACTICE § 52.03 at p. 2631; 14 CYCLOPEDIA OF FEDERAL PROCEDURE § 67.32 at p. 227 (3d Ed. 1952).

II.

ON THE CONCEPT OF GROSS INCOME

Respondent takes a cart-before-the-horse approach and suggests that the Court decide the deduction issue first, because if the Court should find that a deduction is proper "there would be no need to reach the gross income question since Petitioner would in any event be entitled to an offsetting deduction" (R. Br. 36). This is circuitous reasoning which leads nowhere. Even if the Court does nothing more than allow Petitioners a deduction, it is by implication holding that the value of the convention trip is includible in their income; unless such value is first run through the tax mill and the expenditures thereby attributed to Petitioners, there can be no basis for a deduction. Moreover, the question is not "teasing but unimportant", for in the case of employees the employer will be faced with the difficult burden of withholding,* regardless of whether or not the employee is permitted an offsetting deduction.

Therefore, with the horse once again back where it belongs, we can continue.

Respondent obviously misunderstands our analysis of the gross income concept. He indicates that we would exclude the value of the convention trip from Petitioners' gross income on the ground that "it can be realized only by being consumed and therefore has not *transferable* value" (R. Br. 37), but, he further suggests, we eventually see the error

*Sections 3401 (a), and 3402, Internal Revenue Code of 1954; Reg. 31.3401(a)1(b)(10). Cf. Hallmark Cards, Inc. v. United States, 62-1 U.S.T.C. 9162 (W.D. Mo. 1961).

of our own way and in the end add the proviso "if not intended as compensation" (R. Br. 46).

Let us set the record straight. We did not in our original brief, nor do we now, contend that the nature of the thing received *a fortiori* may determine whether or not it constitutes gross income. If an employer confers a benefit upon an employee primarily as compensation, the employee realizes income whether the benefit is consumable, edible or otherwise, unless it fits within some statutory exception. This Court has said so,[9] and we make no pretense of going counter to that principle. But in the absence of intent to compensate, the nature of the thing received—whether in kind or cash—is one of a combination of factors which may be influential in deciding whether or not it comes within the ambit of gross income.

For instance, if an employee receives money from his employer which he is obligated to expend in a prescribed manner for prescribed purposes, the receipt of those funds does not constitute income to him. This conclusion is justified by the conduit or agency theory,[10] which, perhaps, is the converse or corollary of the "claim of right" doctrine. Thus, assuming that in this case there was no intention to compensate, if the Company made all arrangements for the convention (as it did) and merely gave Petitioners cash to pay the bills applicable to them, the receipt and disbursement

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[9]Comm'r v. Smith, 324 U. S. 177 (1945).

[10]The Seven-Up Co., 14 T.C. 965 (1950) (receipt of funds to be expended on behalf of another not income to the recipient); Broadcast Measurement Bureau, Inc., 16 T.C. 988 (1951) (same); Rev. Rul. 56-152, 1956-1 Cum. Bull. 58 (brokerage commissions not income where impressed with a public trust and deposited in special fund for public purposes). See also 2 MERTENS, LAW OF FEDERAL INCOME TAXATION §§ 17.11, 17.12 (1961).

of that cash should not constitute income to Petitioners because they were only acting as agents to discharge the obligations of the company. The dominion and control over the funds continued to rest in the Company, because they directed how it was to be spent.

On the other hand, if an employee receives money from his employer to be expended upon himself in the pursuit of his employer's business, but he is given wide discretion as to how and when the money shall be spent, his dominion and control over the receipt may be sufficient to warrant its inclusion in gross income in the first instance, even though he is allowed an offsetting business expense deduction. Even here there is grave doubt about inclusion of the receipt in income, since the courts and Respondent have recognized that reimbursement of expenses incurred on behalf of another is not income to the recipient, probably on the theory that the reimbursement represents repayment of a loan.[11]

Finally, if an employee receives something in kind, which is intended to further the business of the employer and bears a reasonable relationship to that end, the circumstances are most analogous to receipt of money which must be expended in a prescribed manner and for prescribed purposes on behalf of the employer—the "in kind" counterpart of the agency concept. In other words, where an employer gives an employee something in kind to be used in

[11] Robert L. Gray, 10 T.C. 590 (1948) (reimbursement of expenses not income); Julien A. Martin, 1952 P-H T.C.M., dec. 52,282 (same); I.T. 4068, 1952-1 Cum. Bull. 7 (fees from child placement agency to foster parents for costs of maintenance not includible in income); Rev. Rul. 60-280, 1960-2 Cum. Bull. 12 (reimbursement to parents by school board for costs of transporting children where bus service not available held not income). See also Rev. Rul. 60-279, 1960-2 Cum. Bull. 11.

or for purposes of the employer's business, the employer has effectively retained dominion or control over the thing and directed its use; accordingly, there is no justification for including the value of the thing in the employee's income. This is the importance of the nature of the thing received, and none other. Therefore, Respondent's "exposure" (R. Br. 8-9, 46-48) of the error in our alleged theory of benefits which can be realized only through consumption, is simply not in point, because that was not the point we endeavored to present.

Furthermore, we do not refute the significance of *Glenshaw Glass, Comm'r v. Smith*, or the other important decisions cited in both Petitioners' and Respondent's briefs. As stated previously, we rely upon those cases as recognizing intrinsically that not every gain realized by an employee in an economic or psychic sense constitutes gross income, and that there are exceptions to gross income other than those specifically enumerated in the statute. We are not asking the Court to restrict in any manner the scope of those cases, nor are we soliciting a reversion to the "nature of income" approach of *Eisner v. Macomber*.[12] But we do urge the Court to recognize an area beyond the peripheries of those cases wherein, under limited and proper circumstances, an employee may receive a benefit from his employer yet not be in receipt of taxable income. In appreciation of the fact that non-statutory exceptions to gross income should be acknowledged parsimoniously, and only after exhaustive consideration, we have attempted to spell out meticulously the circumstances which should be present if there is to be

[12] 252 U.S. 189, 64 L. Ed. 521, 40 S. Ct. 189 (1920).

an exception: (i) the employer did not intend the benefit conferred to be additional compensation to the employee; (ii) there is no undeniable assession to the employee's wealth, clearly realized, over which he has complete dominion; and (iii) the dominant motive of the employer is to further his business and the thing provided bears a reasonable relationship to that end.

If the Court accepts the foregoing as a correct interpretation of the law, then it is agreed that the taxability of the convention trip to Petitioners turns on whether or not the first test is satisfied—whether or not the Company intended the trip as additional compenstaion to Petitioners. Even so, the issue is not simply whether the facts found by the District Court are clearly erroneous; rather, for the reasons stated hereinbefore it is an issue which the Court should decide.

III.

WITH RESPECT TO CONVENTIONS AND "ORDINARY AND NECESSARY" BUSINESS EXPENSES

Although the same basic facts that lend support to an exclusion from income also, when turned around, confirm the presence of legitimate business expenses, it is important, at the outset, to perceive a distinction between the two. The issues of income and expense are not mirror reflections of each other. The "income" side of the case is essentially one of demonstrating reasonable justification under the law for excluding something from the broad concept of gross income.

The expense side of the case, however, is concerned less with esoteric concepts and more with the pragmatic and reasonable business judgment of reasonable businessmen. Therefore, upon exactly the same facts, a benefit conferred by an employer upon an employee might be caught in the web of gross income and nevertheless constitute an imputed business expense of the employee.

Respondent has directed a two-pronged attack against our argument that the expenditures here involved, if imputed to Petitioners, would constitute "ordinary and necessary" expenses of doing business. We shall address ourselves to that attack.

1. Initially, Respondent urges that the compulsion upon Petitioners to attend the convention is meaningless except as evidence of "the employer's reasons for wanting the act done."[1] He undertakes to emphasize his point by indulging in what has been eloquently called the "parade of horribles," whereby the consequences of a decision are strung out in seemingly logical sequence until the end result is undesirable —and absurd. We do not suggest that a taxpayer be permitted to deduct the cost of food or shelter merely because his employer ordered him to do so in recognition of the fact that one must eat and sleep to work (R. Br. 31). But we do suggest that it is legally significant when an employer requires an employee to participate in an activity planned by the

[1] This underscores another fallacy in Respondent's argument that the convention trip was intended as compensation to Petitioners. It is rather unusual, we would think, that an employer would force compensation upon an employee by making receipt of that compensation compulsory. The fact that Petitioners were required to take the convention trip indicates that "compensation" was not what the Company—nor Petitioners—intended.

employer, and accepted by virtually all members of a nation-wide industry, as a vital facet of and aid to the business of both the employer and employee.

Respondent apparently would concede that Petitioners' imputed expenditures in attending the convention were "necessary" within the meaning of section 162, since they were required to attend by the Company. However, his brief also points out (R. Br. 32), and properly so, that to be deductible an expenditure must not only be "necessary" it must also be "ordinary". We likewise agree that the expense must bear a "direct and proximate" relationship to the business of Petitioner, but, at this juncture, we part company.

Respondent states that our "recitation of the numerous kinds of conventions for which deductions have been allowed proves nothing (R. Br. 25)". What it does prove is very important to this case: that conventions are an "ordinary" (and, indeed, a common-place) part of our business life, and that expenditures incurred by taxpayers in attending conventions have long been deductible as "ordinary and necessary" expenses of doing business. We dare say that the convention involved herein was not dissimilar in make-up to any of the conventions in the cited cases, except for the fact that the convention was Company-sponsored for its employees. This latter fact would seem to make the convention more "ordinary" in Petitioner's business, not less so.

As for the "direct and proximate" relationship between the expenditure and the taxpayer's business, how could the relationship be considered otherwise when the convention was sponsored by Petitioner's employer, his fellow agents and

officers of the company were the participants, the theme of the convention was the business of selling insurance, and all activities at the convention, including group travel to and from the convention site, were designed to encourage the free interchange of ideas between the agents and the officers.

Finally, on top of the usual business reasons for attending conventions (which were recognized by the cited cases), we believe that legal significance should be attributed to the fact that Petitioner's employer required him and his wife to attend. Does not this fact give Petitioners a business reason and purpose to participate in the convention over and above the independent business benefits which he derives from such participation? We are not talking here about a fictitious demand by an employer that an employee do something traditionally considered personal, such as eat, dress well, etc.; we are talking about a demand by an employer that an employee do something traditionally considered businesslike. When the employee reacts in the only sensible way he can, he is reacting—and acting—for business reasons.

2. Respondent states that " 'shop talk' is a part, not of the business, but of the life, of the professional man." The question is asked, then, whether "shop talk" is enough to convert an otherwise social event into a business one. Indeed, it is not. If a group of lawyers and their wives gather for a social dinner, the occasion does not turn into a business event because the lawyers huddle in one corner of the room to talk

about the law. By the same token, merely because a planned gathering of members of a profession is not regimented with formal meetings, does not turn this business event into a social one. The "shop talk" at a professional convention is a manifest part of the business of the convention, and is as important to the success thereof as the formal meetings. In the circumstances of a convention, "shop talk" is not a mere incident to a social event in one's life; it is an integral part of the business event itself. Can it be said that informal discussion at a Bar Association convention—or any professional convention—"does not bear to the business [of the professional man] the *kind* of relationship that is implied by 'ordinary and necessary' (R. Br. 35)"?

Respondent suggests that "shop talk" should be recognized as a business activity "only when it is formally organized and channelled, as at formal meetings, round-table discussions, conferences, training sessions and the like." The officers of the Company testified that the informal association and discussion among the agents and officials was an important part of the convention program, and that the activities and group travel were planned with this in mind. Must "shop talk" be pursued in an auditorium to constitute a business activity, or can "shop talk" be formally organized on an informal basis? We think the latter is more effective and better serves the business purpose for which such discussion is intended.

IV.

WIVES, CONVENTIONS, AND BUSINESS EXPENSES

We submit that if Petitioner, C. J. D. Rudolph, is deemed to have incurred expenses in taking his wife to the convention, those expenses are deductible as "ordinary and necessary" business expenses for essentially the same reasons that his own expenses are deductible. Respondent offers to refute this by again utilizing the "parade of horribles" type of argument. We do not think that the cost of supporting a wife at home is deductible simply because an employer will hire or retain in his employ only married men (R. Br. 55).

On the other hand, if a major corporation, in the exercise of its business judgment, establishes a policy of interviewing the wives of prospective employees, of continuously soliciting the wives' good will and support through letters and publications, and of addressing a portion of its convention program to the wives, we believe that there does exist a direct kind of relationship between an agent's business and his wife's presence at the convention. Under such circumstances, a wife's expenses to attend the convention should be deductible even if incurred voluntarily. Where the wife's presence is a "command performance", and the agent acts in deference to his employer's decision and business judgment, we think the relationship between business and expense is unequivocal.

Wives are, after all, a fact of life. If this is recognized by an employer, as well as by the husband, and an earnest and

formal effort is made by both to encourage the wife's understanding of her spouse's job and the company for which he works, we think the project is sound business and the money well spent.

V.

ANALYSIS OF THE "FACT FINDINGS"

1. Considering the record as a whole, we believe that the "facts" found by the District Court are clearly erroneous. However, before getting down to the facts, we wish to reiterate our contention that in exercising its power of review the Court is not limited to determining whether the findings are "clearly erroneous". The instant case involves definitional refinements of the concepts of "gross income" and "ordinary and necessary" business expense about which neither this Court nor any other court (except the lower courts herein) has previously spoken. In the absence of guiding legal principles on such pervasive matters, the responsibility of the trial tribunal must of necessity be narrowly confined and, we submit, this Court should exercise its broadest powers of review.

2. Furthermore, we believe that the "findings of fact" by the District Court were predicated upon an erroneous assumption as to the governing law. The opinion of the court stated (R. 79): "It is the purpose of the convention to the taxpayers which governs our action, *not the purpose of the insurance company in holding them* (emphasis supplied)." Even Respondent assuming the validity of the

remainder of our legal proposition, states that the income question turns on the reasons why the Company sponsored the convention and paid Petitioners' expenses. In other words, the purpose of the Company "in holding them" is of the utmost importance—if not the controlling factor—in determining whether the convention trip constitutes income to Petitioners. Yet the trier of the facts admittedly ignored that inquiry. On the expense question, the purpose of the Company in sponsoring the convention is of like importance. Again, that determination was ignored. Moreover, the court apparently was of the opinion that the convention had to be "purely educational" in order for it to qualify as a business meeting.

The failure of the trial tribunal to inquire into and accord due weight to the purpose of the Company in sponsoring the convention establishes that the "fact findings" were based upon an error of law, and, as we shall demonstrate hereinafter, inexorably led to the "fact findings" being clearly erroneous. Findings of fact based upon an error of law are not protected by the "clearly erroneous" rule.

3. Because the opinion does not clearly review the facts, but merely draws inferences therefrom, it is not feasible to isolate the specific fact findings which are clearly erroneous, although at least two analogies which the court used to illustrate its conclusion are based upon "clearly erroneous"

factual premises." From the record and the opinion as a whole, however, it is apparent that the scope of inquiry was limited to the objective or extrinsic aspects of the convention —such as the location of the convention site, its distance from the Company's home office, and the fact that Petitioners' received a presumed benefit in the form of the convention trip (the same, the court hypothesizes, as if they had received an automobile). The court's limited inquiry is a natural outgrowth of his rejecting the Company's purpose in sponsoring the convention as being of any relevance. Based upon extrinsic appearances only, the court concluded that the convention trip was in the nature of a bonus or reward.

The conclusion of the court is particularly weak in that it is contrary to the very testimony—uncontroverted testimony —which the court chose to ignore as being irrelevant: that the purpose of the Company in sponsoring the convention was not to give a bonus or award to Petitioners; that its purpose was to build esprit de corps, instruct the agents, and encour-

"The fourth paragraph of the opinion beginning on page 80 of the Record not only appears to represent some generalized conclusions of law about the purpose of conventions, but also suggests that the agent, to enjoy the trip, "would have paid out * * * his own funds if the company had not given it to him. * * *" Rudolph testified (R. 43) that he would not have gone had he been required to pay his own way. He also testified that "Whenever I take a trip I like to get away from it all, not have any schedule, and do as I please (R. 43)."

The fifth paragraph on page 80 of the Record describes, by supposed analogy, a situation where an insurance agent is given a choice of a trip to Paris, France, or a $500 bonus if he sells a specified amount of insurance. The analogy is inapposite to the facts before the court. Had Petitioners been unable for any reason to attend the convention, they would have received nothing in lieu thereof (R. 32, 54). Furthermore, the implication that Petitioners received the convention trip as an award for selling so much life insurance is also contrary to the evidence. Certain minimum production standards were established by the Company as a guide for selecting the agents who should attend the convention (R. 61), but the convention was not, nor intended to be, a quid pro quo for services rendered. Even though an agent qualified to attend, he still had to be invited by the Company (R. 49), and there was no distinction between agents meeting the minimum standard even though their sales of insurance may have varied greatly.

age the exchange of ideas about the sale of life insurance. Mr. J. Harry Wood, a qualified expert in the management of insurance companies and then Managing Director of the Life Insurance Management Association, testified (R. 64-72) that conventions of the type here involved were held almost universally by members of the life insurance industry since 1924, as a part of an agency development program and for the sound business purposes of motivating the agents, building the company "image", and stimulating the exchange of ideas.[14]

It would not seem proper or correct for the trial tribunal to draw inferences dispositive of the case from undisputed evidentiary facts (the extrinsic aspects or appearances of the convention), where the inferences so drawn are unequivocally contrary to uncontroverted oral testimony before the court.[15]

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[14] Mr. Wood testified (R. 66):

"Q. Is it traditional in the life insurance agency to hold this type of convention as part of the agency development program of the company?

"A. Yes; too, I say it is more than that but companies usually think of holding them to educate—but I mean education in a little bit different way than normal, to motivate, to build loyalty; but to my mind, one of the chief reasons for a general convention is to rekindle and reeducate the man to the life insurance business because this is sort of a lonely business in the sense you probably get more turn-downs to sales than in many others, and so, when agents meet other successful agents from over the country and find out they have the same problems, I think much is accomplished by that meeting.

"Q. Is anything accomplished toward acquiring and maintaining loyalty to the company at the convention?

"A. Yes, it is, but the loyalty comes about from two or three ways. First you form a loyalty by learning and knowing the company is strong and the company is strong in part by reaction toward management; and, secondly, because your loyalty to any organization is partly loyalty to individuals and as you get to meet individuals of that company from all over the country, that builds a friendship which in turn makes for loyalty."

[15] See, *e.g.*, J. H. Robinson Truck Lines, Inc. v. Comm'r, 183 F. 2d 739 (5th Cir. 1950); Wright-Bernet, Inc. v. Comm'r, 172 F. 2d 343 (6th Cir. 1949); Mayson Mfg. Co. v. Comm'r, 178 F. 2d 115 (6th Cir. 1949); Kent v. Comm'r, 170 F. 2d 131 (6th Cir. 1948); Hartz v. Comm'r, 170 F. 2d 313 (8th Cir. 1948).

Decisions would be simple if everything was cast in terms of black and white, as the villain and the hero in the silent films. Obviously, the convention trip was intended to be a pleasant experience for the participants, and no doubt it was so. It would be simple enough, therefore, to look only at the social aspects or outward appearances of the convention and conclude that it was in the nature of a bonus to the fortunate recipients. *But on all the facts before the court*, it is quite apparent that the purpose of the Company in sponsoring the convention was rooted in business reasons much more complex and important than simply paying its agents a bonus.[17] After all, why did the Company go to the time, effort and added expense in planning a convention of this scale if its objective was simply to pay a bonus? Why require the agents

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[17] Respondent refutes our suggestion that trial counsel for the Government did not question the bona fides of the convention (R. Br. 18, n. 6). However, Mr. J. Harry Wood, Managing Director of the Life Insurance Agency Management Association, was in the process of testifying about the business purposes which insurance companies have for holding conventions of the type involved herein. Mr. Vaseliades, counsel for the Government, objected on the ground that the witness could not testify to the purpose of a convention without having been there. Apparently because of Mr. Wood's expertise in this field, the Court permitted him to state "the advantages that accrue to the company by reason of holding them [the conventions]." Mr. Vaseliades then stated (R. 67):

> "One further reason for my objection is, as I stated before, we are not challenging the bona fides of this *production* (emphasis supplied) to the insurance company; that is not an issue and any evidence on that matter is irrelevant to our issue. That is all he has given us here today."

Respondent would cast this admission aside on the grounds that (R. Br. 18, n. 6):

> "The word 'production' seems an obvious mistranscription of 'deduction', and it is true that we have never challenged the deductibility of the costs of the convention to the Company."

However, expenses of the type here in issue generally were not deductible by life insurance companies in 1956, which Respondent acknowledged in his brief before the United States Court of Appeals for the Fifth Circuit. See section 803, Internal Revenue Code of 1954. Counsel for Petitioners were present at the trial, and Government counsel did, we believe, use the word "production", obviously referring to the convention.

and officers of the Company to travel together? Why require that the agents attend at all? The answers to these questions are reflected in the uncontroverted testimony before the court, and they demonstrate business motives which could not be fulfilled by offering the agents the inducement of, and actually paying, added compensation.

Similarly, the District Court found that the "trip was primarily a pleasure trip in the nature of a vacation", and this is apparently all he found with respect to the reasons why Petitioners attended the convention. The original error of the court in disregarding the business purpose of the Company in sponsoring the convention is thus compounded. If the trip was intended as a bonus, it is quite reasonable to assume, from the standpoint of the recipient, that the trip was accepted primarily for reasons of pleasure. On the other hand, if one does not ignore the uncontroverted testimony that the Company sponsored the convention for business purposes unrelated to the harvest it might hope to reap by paying its employees a bonus, the reasons why Petitioners attended appear quite different. One does not take a vacation when one is compelled to attend a business meeting. An officer of the Company testified that Rudolph was expected to attend the convention as part of his responsibilities as an agent (R. 61, 74), and that he would have been called upon to present a valid reason had he been unable to attend (R. 54). Rudolph likewise testified that he was required to attend (R. 28). Furthermore, if the primary purpose of the convention was business, the relationship between the convention and Rudolph's own business seems beyond dispute.

Therefore, considering the record and opinion as a whole, it is our conviction that the "findings of fact" are "clearly erroneous" and should be set aside.

CONCLUSION

In conclusion, we believe that Respondent's brief has obscured the issues which we feel are so important for the Court to decide, and we have endeavored to bring them once again into clear focus. We urge the Court to take this opportunity to up-date their expression of the law, so that the practical business purposes which make the company convention a common-place part of the American scene will be accorded proper recognition in the application of the tax laws.

For the reasons here stated and in our main brief, it is submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

FELIX ATWOOD,
RICHARD A. FRELING, of
TURNER, WHITE, ATWOOD,
MEER & FRANCIS,
1900 Mercantile Dallas
Building,
Dallas 1, Texas,
Attorneys for Petitioners.